No. 88-124-CFX
Status: GRANTED

Title: Lynn L. Breininger, Petitioner
v.
Sheet Metal Workers International Association Local Union No. 6

Docketed:
July 20, 1988

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Landry,Francis J.

Counsel for respondent: Julius,Jeffrey, Gold,Laurence

Entry	Date	Note	Proceedings and Orders
1	Jul 20 1988	G	Petition for writ of certiorari filed.
2	Aug 18 1988		Brief of respondent Sheet Metal Workers International Assn, Local Union No. 6 in opposition filed.
3	Aug 24 1988		DISTRIBUTED. September 26, 1988
4	Oct 3 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	Jan 27 1989		Brief amicus curiae of United States filed.
6	Feb 1 1989		REDISTRIBUTED. February 17, 1989
7	Feb 21 1989		Petition GRANTED.
			**********
8	Apr 6 1989	G	Motion of Association for Union Democracy, et al. for leave to file a brief as amici curiae filed.
9	Apr 7 1989	G	Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae filed.
10	Apr 7 1989		Brief amicus curiae of United States filed.
11	Apr 7 1989		Joint appendix filed.
12	Apr 7 1989		Brief of petitioner Lynn Breininger filed.
13	Apr 17 1989		Motion of Association for Union Democracy, et al. for leave to file a brief as amici curiae GRANTED.
17	Apr 21 1989	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Apr 27 1989		Order extending time to file brief of respondent on the merits until June 2, 1989.
14	May 1 1989		Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae GRANTED.
19	May 15 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	May 22 1989		Record filed.
		*	Certified copy of original record, 5 volumes, received.
21	May 23 1989		Record filed.
		*	Certified copy of C. A. Proceedings received.
22	May 31 1989		Order further extending time to file brief of respondent on the merits until June 5, 1989.
23	Jun 5 1989		Brief of respondent Sheet Metal Workers International Assn, Local Union No. 6 filed.
24	Jun 30 1989		Reply brief of petitioner Lynn Breininger filed.
25	Jul 13 1989		CIRCULATED.

No. 88-124-CFX

Entry	Date	Note	Proceedings and Orders
26	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 10, 1989. (2ND CASE)
27	Oct 10 1989		ARGUED.

88-124

Case No. ——

Supreme Court, U.S.
FILED
JUL 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

LYNN L. BREININGER
PETITIONER

v.

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI:

A. Whether a union member's claim that his union breached its duty of fair representation by engaging in discriminatory job referrals may be brought in Federal District Court in an action invoking the court's jurisdiction under 28 U.S.C. Section 1337?

B. Whether a union member who claims that his union breached its duty of fair representation by engaging in discriminatory job referrals may maintain an action against his union in Federal District Court notwithstanding the absence of an affirmative allegation that an employer breached a collective bargaining agreement?

C. Whether a union's discriminatory refusal to refer its member to jobs constitutes "discipline" within the meaning of the Labor Management Reporting and Disclosure Act?

PARTIES TO PROCEEDINGS BELOW

Lynn L. Breininger, plaintiff-appellant below and petitioner herein was a member of Sheet Metal Workers International Association Local Union No. 6 since he entered its apprenticeship program in 1949.

Sheet Metal Workers International Association Local Union No. 6 is a labor organization representing journeymen and apprentice sheet metal workers and a party to a multi-employer collective bargaining agreement covering the Toledo, Ohio area and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Lynn L. Breininger, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for Sixth Circuit entered in this matter on March 1, 1988. On April 22, 1988, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing which had been timely filed on March 15, 1988.

OPINIONS BELOW

The March 1, 1988 opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is sought to be reviewed was originally not recommended for publication in accordance with its Local Rules. On June 15, 1988, the United States Court of Appeals for the Sixth Circuit granted a motion for publication of its March 1, 1988 decision. The decision has not been reported to date and is represented in the Separate Appendix to this petition at Appendix A, pp. A1 to A3. Publication is pending. The prior opinion of the United States District Court for the Northern District of Ohio, Western Division, also reprinted in the Appendix B at pp. A4 to A11 is an unreported decision.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 1, 1988. On March 15, 1988, petitioner filed a timely petition for rehearing before the United States Court of Appeals for the Sixth Circuit. In its Order filed on April 22, 1988 the United States Court of Appeals for the Sixth Circuit denied petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

—o—

STATUTORY PROVISIONS INVOLVED

The statutes involved are set forth in Appendix E at pp. A13 to A15.

—o—

STATEMENT OF THE CASE

This Petition challenges the judgment of the United States Court of Appeals for the Sixth Circuit which affirmed a dismissal by the United States District Court for the Northern District of Ohio of petitioner's First Amended Complaint which alleged (1) that the Sheet Metal Workers International Association Local Union No. 6 (hereinafter "Local 6") breached its duty of fair representation by engaging in discriminatory job referrals and (2) that the said Local 6 failed to refer Petitioner to jobs because of his previous support of unsuccessful candidates for business manager and business agent, as part of

said local's widespread, improper "discipline" for political opposition in violation of 29 U.S.C. Section 411(5), 29 U.S.C. Section 412, and 29 U.S.C. Section 529. See First Amended Complaint, Appendix F at A16.

The applicable collective bargaining agreement, which covered all sheet metal workers under the jurisdiction of Local 6, provided that the Union was to furnish upon request duly qualified journeymen and apprentice sheet metal workers and that employers were to confirm, in writing, to Local No. 6 when requesting employees.

Petitioner alleged that on one occasion, when a contractor from outside of the Local 6 jurisdiction requested him by name in writing, the Union refused to send him and sent out two other men. Petitioner also alleged that two men were referred out of sequence of the union's job referal list to his detriment. One of these persons was a member of the "Concerned Brothers", a political group that backed the administration of the business manager and business agent then in office.

Petitioner also alleged and testified in his deposition to widespread discrimination in referrals made to lucrative jobs at Bechtel Power Company's Fermi job site. These referrals went primarily to members of the "Concerned Brothers" political group. No written job requests from Bechtel Power Company to the Local 6 were available in discovery.

Petitioner testified in his deposition that he had filed charges with the International Union and that he had contacted the National Labor Relations Board only to be informed that the instant matter was a contract dispute and that the NLRB did not handle that sort of claim.

In its Opinion and Order filed on February 20, 1987, the United States District Court for the Northern District of Ohio, Western Division, per Judge Nicholas J. Walinski, granted a Motion made by Local 6 for Summary Judgment and dismissed Petitioner's First Amended Complaint on the ground that both the claim for breach of duty of fair representation and the claim for alleged illegal discipline in violation of the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. Sections 411, 412 and 529 were pre-empted by the National Labor Relations Board's exclusive jurisdiction (Appendix B at pp. A4 to A11). On appeal by Petitioner herein, the United States Court of Appeals for the Sixth Circuit in its decision filed March 1, 1988 affirmed the February 20, 1987 Opinion and Order of the District Court holding that Petitioner's claim for breach of duty of fair representation was pre-empted by the National Labor Relations Board's exclusive jurisdiction over allegedly discriminatory referral policies and that alleged discrimination in Local 6's referral system did not breach the employee's union membership rights and did not constitute "discipline" within the meaning of the Labor Management Reporting and Disclosure Act (Appendix A at pp. A1 to A3). On April 22, 1988, the United States Court of Appeals for the Sixth Circuit denied, without any opinion, Petitioner's Petition for Rehearing (Appendix D at p. A12).

In the within case, Petitioner had invoked the jurisdiction of the United States District Court for the Northern District of Ohio, Western Division pursuant to 28 U.S.C. Sections 1331, 1337, 1343(4) and 28 U.S.C. Sections 2201 and 2202. As to the First Count of his First Amended Complaint, Petitioner further alleged that his suit was

brought pursuant to 29 U.S.C. Sections 151, 158(b) and 159, based on allegations of the breach of duty of fair representation. As to the Second Count of his First Amended Complaint, Petitioner further invoked the District Court's jurisdiction pursuant to 29 U.S.C. Sections 411, 412, and 529, known as the Labor Management Reporting and Disclosure Act, as amended.

REASONS FOR GRANTING THE WRIT

Petitioner, Lynn L. Breininger, respectfully submits that the United States Court of Appeals for the Sixth Circuit has erroneously decided that a union member who has alleged that his union breached its duty of fair representation by failing to refer him to jobs must bring that claim before the National Labor Relations Board. In so ruling, the Sixth Circuit has divested union members of their rights to invoke the Federal Court's jurisdiction in order to supervise union conduct. In the within case, Petitioner alleged in his First Amended Complaint that the respondent's course of conduct was arbitrary, discriminatory and in bad faith without reason or cause. The Sixth Circuit, in holding that the District Court lacked jurisdiction, cited *Local 100; Journeymen v. Borden,* 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963) for the proposition that the NLRB has exclusive jurisdiction over claims of discrimination in job referrals. It is respectfully submitted that in *Borden, supra,* this Court dealt only with the issue of NLRB pre-emption over State Court Claims.

Moreover, *Borden* was decided prior to two decisions of this Court acknowledging a "duty of fair representa-

tion" exception to NLRB pre-emption. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971).

In *Amalgamated Association of Sheet, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971), this Court explained that actions seeking damages for a breach of a union's duty of fair representation exist concurrently with the National Labor Relations Board remedies. This Court explained at 403 U.S. at 301:

> . . . this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principal that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not otherwise be regulated by the substantive federal law . . .

In the within case, Petitioner alleged in his First Amended Complaint that "in refusing to honor employer requests for plaintiff's employment, in refusing to properly administer the job seniority list, and in refusing to process and/or acknowledge his charges, the defendant union, in its representation of plaintiff, has acted arbitrarily, discriminatorly, and/or in bad faith and/or without reason or cause." See First Amended Complaint, Appendix F at p. A20). It is submitted that this

Court's two previous opinions in *Vaca v. Sipes*, 386 U.S. 171 (1967) and in *Amalgamated Association of Sheet, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971) sought to prevent the exact result sanctioned by the United States Court of Appeals for the Sixth Circuit in the within case.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court noted that a primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the durability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving breaches of the union's duty of fair representation. The statutory duty of fair representation was developed over forty years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act. *Steele v. Louisville and N.R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). The duty of fair representation was soon thereafter extended to unions certified under the National Labor Relations Act. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). The duty of fair representation remained judically cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the LMRA. Moreover, when the Board decided that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. See *Vaca v. Sipes*, 386 U.S. 171 at 181.

As this Court noted in *Vaca v. Sipes,* the collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interest of an individual employee to the collective interests of all employees in the bargaining unit. *Vaca v. Sipes,* 386 U.S. 171 at 182. This Court explained the implications of a pre-emption rule of individual union member's rights in *Vaca v. Sipes,* 386 U.S. 171 at 182 as follows:

> . . . This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198-199. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the government urge, that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.

Thus, even if the Board were unwilling or unable to remedy even a small group of cases involving a union's breach of duty of fair representation, the Board's inaction would frustrate the basic purposes underlying the duty of fair representation.

It is respectfully submitted that the Sixth Circuit's decision in the within case conflicts with the aforementioned prior holdings of this Court.

Moreover, the Sixth Circuit decided the within case in conflict with its own previous holding and in conflict with case law enunciated in other circuits. In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971), this Court noted at 403 U.S. at 299:

> . . . Indeed, in *Vaca v. Sipes,* 386 U.S. 171 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement.

In *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir.1974), a case like the present one involving job referrals, the Fifth Circuit noted at 500 F.2d at 748:

> Every Circuit which has faced the question has concluded that the federal courts have subject matter jurisdiction over a bare DFR claim under 28 U.S.C. Section 1337, which authorizes federal suits arising under any act of Congress regulating commerce. The National Labor Relations Act is an "Act of Congress regulating commerce." See Capital Service vs. NLRB, 1954, 347 U.S. 501, 504, 74 S.Ct. 699, 702, 98 L.Ed. 887. A suit for breach of a duty of fair representation is one "arising under" the National Labor Relations Act within the meaning of Section 1337 by virtue of Section 9(a)'s dual creations of exclusive power in the bargaining agent to represent all employees in the unit and the correlative obligation to represent those employees fairly in dealings with the employer.

See *Nedd v. United Mine Workers of America,* 400 F.2d 103 (3rd Cir.1968); *Retana v. Apartment, Motel, Hotel*

and Elevator Operators Union, Local No. 14, 453 F.2d 1018 (9th Cir.1972); *De Arroyo v. Sindicate de Trabajadores Packing House,* 425 F.2d 281 (1st Cir.1970); *Cunningham v. Erie Railroad Co.,* 266 F.2d 411 (2d Cir.1959); *Brady v. Trans World Airlines, Inc.,* 401 F.2d 87 (3rd Cir.1968).

The internal conflict of the Sixth Circuit is highlighted by reviewing *Storey v. Local 327, International Brotherhood of Teamsters,* 759 F.2d 517 (6th Cir.1985), wherein the Sixth Circuit held that claims for breach of a union's duty of fair representation are within the Section 1337 jurisdiction of federal district courts even where there is no accompanying claim under Section 301 for breach of contract. In *Storey, supra,* the Sixth Circuit adopted this jurisdictional view of this issue and specifically embraced the Fifth Circuit view enunciated in *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir.1974). In *Storey, supra,* the Sixth Circuit opined at 725 F.2d at 523:

> . . . The duty of fair representation does not arise out of a collective bargaining agreement; it flows from the union's statutory position as exclusive representative and exists both before and after the execution of an agreement.
>
> In a case similar to the present one in many respects, the Fifth Circuit has held in Smith v. Local 25, Sheet Metal Workers International Association, 500 F.2d 741, 748 (5th Cir.1974), that claims for breach of a union's duty of fair representation are within the Section 1337 jurisdiction of federal district courts even when there is no accompanying claim under Section 301 for breach of contract. We adopt the view of the jurisdictional issue as developed by the Fifth Circuit and several other courts of appeals . . .

By stark contrast, without mentioning its prior holding, the Sixth Circuit states as follows at p. 2 of its March 1, 1988 decision:

> Moreover, if the employee fails to affirmatively allege that his employer breached the collective bargaining agreement, which appellant has failed to do in the case at bar, he cannot prevail . . .

In *Lewis v. Local Union No. 100 of Laborers International Union of North America,* 750 F.2d 1368 (7th Cir.1984), a case involving job referral discrimination, the Seventh Circuit held that under *Vaca v. Sipes,* the federal courts retain concurrent jurisdiction with the NLRB over all fair representation claims regardless of the presence of the employer as a defendant in the lawsuit.

It is respectfully submitted that in the within case the Sixth Circuit has unwarrantedly intruded upon the rights of individual union members to redress invidious, arbitrary and hostile union activity. The Sixth Circuit has gone off on a direction of its own, ignoring its own previous authority, that of other circuits and most importantly, that of this Court. If the Sixth Circuit's opinion is permitted to stand unchallenged, organized labor will be permitted to engage in gross patterns of discrimination in job referrals without facing the threat of a member's lawsuit to restrain its conduct. The rights of individual union members will suffer.

It is respectfully submitted that the Sixth Circuit's opinion is in conflict in this respect with other circuits and with its own previous decision. Thus, supervision of this Court is necessary in order to promote uniformity and to clarify the conflict in the Circuits.

In dealing with the Second Count of Petitioner's First Amended Complaint, the Sixth Circuit has decided that Petitioner's claims did not constitute "discipline" under 29 U.S.C. 411(a)(5). It is respectfully submitted that in the within case, Petitioner was not a union officer but a long time member who was not referred for employment by his union because of his prior political opposition to the "Concerned Brothers". The Sixth Circuit failed to mention its previous holding in *Murphy v. International Union of Operating Engineers, Local 18,* 794 F.2d 114 (6th Cir.1985), wherein it held that a union's action in foreclosing a member's participation in a work referral program was an action which set him apart from other members in good standing. The Sixth Circuit in *Murphy, supra,* noted that such a sanction unquestionably affected the member's membership rights. This Court then should resolve the conflicting approach taken by the Sixth Circuit in order to ensure uniformity of results.

CONCLUSION

For the reasons set forth above, petitioner, Lynn L. Breininger, respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

WASSERMAN, BRYAN, LANDRY & HONOLD

Francis J. Landry
Attorney for Petitioner,
Lynn L. Breininger

APPENDIX

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APPENDIX A

RECOMMENDED FOR PUBLICATION

NO. 87-3224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LYNN L. BREININGER,	)	
	)	ON APPEAL
Plaintiff-Appellant,	)	FROM THE
	)	UNITED STATES
V.	)	DISTRICT COURT
	)	FOR THE
SHEET METAL WORKERS	)	NORTHERN
INT'L ASSOC., LOCAL UNION	)	DISTRICT
NO. 6,	)	OF OHIO
	)	
Defendant-Appellee.	)	

Decided and filed March 1, 1988

BEFORE: ENGEL, KENNEDY and KRUPANSKY, Circuit Judges.

PER CURIAM. The instant action arises from plaintiff-appellant Lynn L. Breininger's allegation that appellee, the Sheet Metal Workers International Association Local Union No. 6 ("the Union") failed to refer Breininger for employment through the union hiring hall. Breininger has asserted that this failure to refer amounted to 1) a breach of the Union's duty of fair representation, and 2) retaliation for political opposition and a violation Sections 101, 102, and 609 of the Union Member's Bill of Rights of the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"). The lower court granted the Union's motion for summary judgment, deciding that the case was committed to the exclusive jurisdiction of the National

Labor Relations Board (NLRB). From this decision, Breininger appealed.

It is well-settled that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB. *See Local 100, Journeymen v. Borden*, 373 U.S. 690, 695-696, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963); *Int'l Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 239, 91 S.Ct. 609, 28 L.Ed.2d 10 (1971); *Turner v. Local Lodge No. 455*, 755 F.2d 866 (11th Cir. 1985).

It is of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of the LMRDA's bill of rights. "It is not the label affixed to the cause of action . . . that controls the determination." *Borden*, 373 U.S. at 698. The case law developed subsequent to *Borden* and *Hardeman* forecloses either theory.

Circuit courts have consistently held that NLRA fair representation claims must be brought before the Board. *Journeymen Pipe Fitters Local 392 v. NLRB*, 712 F.2d 225, 228 (6th Cir. 1983); *Laborers Health & Welfare Trust for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985), *cert. granted*, 107 S.Ct. 1283 (1987). Moreover, if the employee fails to affirmatively allege that his *employer* breached the collective bargaining agreement, which appellant failed to do in the case at bar, he cannot prevail. *Bagsby v. Lewis Brothers, Inc. of Tennessee*, 820 F.2d 799, 801 (6th Cir. 1987) (plaintiff must prove that the employer breached the collective bargaining agreement *and* that the union breached its duty of fair representation or plaintiff cannot succeed against either the union or the employee).

Appellant's LMRDA claim is equally without merit. This claim must fail because appellant did not demonstrate that he was improperly "disciplined," a crucial element to a LMRDA claim.

The term "discipline" was "meant to refer only to punitive actions diminishing *membership* rights." *Finnegan v. Leu*, 456 U.S. 431, 438, 102 S.Ct. 1867, 72 L.Ed.2d 239. The LMRDA's bill of rights is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment. *Id.* at 436-438. Hiring hall referrals are not a function of union membership since referrals are available to non-members as well as to members. *See Turner v. Local Lodge # 455*, 755 F.2d at 869. Discrimination in the referral system, because it does not breach the employee's union membership rights, does not constitute "discipline" within the meaning of LMRDA. *See Turner*, 755 F.2d at 866 (excluding an employee from job referrals does not undermine the union member's status as a member of the union, and, hence, does not violate LMRDA); *Hackenburg v. Int'l Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982) (discrimination in hiring hall referrals does not implicate LMRDA or duty of fair representation).

The decision of the district court to enter summary judgment in the instant case is, therefore, AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LYNN L. BREININGER, Plaintiff,	)	
vs.	)	Case No. C 83-1126 OPINION and ORDER
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, Defendants.	)	

• • •

(Filed February 20, 1987)

WALINSKI, J.

This cause is before the Court on defendant Sheet Metal Workers International Association Local Union No. 6's ("Union") motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. In addition or in the alternative, defendant requests the Court to strike plaintiff's jury demand. Also before the Court is plaintiff's memorandum in opposition with exhibits. Plaintiff's amended complaint alleges a cause of action based on a breach of the duty of fair representation under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§ 151, 158(b), and 159 ("LMRA") and alleges a violation of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 19 U.S.C. §§ 411, 412, and 529 ("LMRDA"). Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1337, 1343(4) and 28 U.S.C. §§ 2201 and 2202. For the following reasons, the Court finds that its jurisdiction is preempted by the NLRB.

At all times material hereto, plaintiff Lynn L. Breininger has been a member of defendant Union. Defendant is signatory to a collective bargaining agreement with various contractor employers within defendant's jurisdiction. That jurisdiction is comprised of the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock, and Seneca in Ohio, and the counties of Monroe and Lenawee in Michigan. (Union Ex. C at 3). Pursuant to Article V of the collective bargaining agreement, it was agreed that the defendant Union would have the responsibility for referral of its members to job sites. In relevant part, Article V states that:

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement . . .

(Union Ex. B 1 at 3-4).

Defendant Union does not maintain an exclusive hiring hall system. There are several options available to members through which one may secure employment. First, a member may have his name placed on the out-of-work list maintained by defendant at the Union hall. Second, a member may have his name placed on a separate list authorizing the defendant to refer him for work under the Specialty Agreement, a separate collective bargaining agreement negotiated to cover work on siding, decking, and metal buildings. Third, a member may solicit employment on his own, in addition to being signed up on the referral lists.

The out-of-work list maintained by defendant Union is signed by members who want to be referred to jobs by

the defendant. When an employer contacts the Union for workers,[1] and does not request workers by name, the Union begins at the top of the list and attempts to telephone each member in the order they appear on the list. This process continues until the requisite number of workers accept the job. (*See,* Union's June 13, 1984 deposition of plaintiff Breininger ["Union deposition"], at 30-32 and Affidavit of David Williams).

A separate list is signed by those members desiring to be referred to jobs pursuant to the Specialty Agreement. When the defendant receives a request for workers from an employer under the Specialty Agreement, the Union begins at the top of the list and attempts to telephone each member as they appear on the list and continues until the employer's request is filled. (*See,* Union deposition at 46 and Affidavit of David Williams).

An employer may request for referral specific employees by name. In these instances, the defendant Union attempts to contact and refer requested individuals to the job. If the defendant is unable to reach a requested worker or that worker refuses the referral, then the Union will refer individuals in order from the out-of-work list to satisfy the employer's request. (*See,* Union deposition at 66 an Affidavit of David Williams).

Members have the right to either accept or refuse a job referral. Refusal to accept a job does not affect a worker's place on the referral list. The individual maintains his position on the list and continues to receive refer-

---

[1]A non-local contractor may only hire two (2) individuals without reference to defendant Union's out-of-work list. (See, Affidavit of David Williams.)

rals from the Union. Acceptance of a job will not remove a person's name from the referral list until that person has worked ten (10) consecutive working days.

In November of 1982, plaintiff was laid off from his employment. Since that time, plaintiff maintains that defendant Union has referred its members to job sites in a manner which discriminates against him. More specifically, plaintiff contends that other members were referred to jobs which had specifically requested plaintiff's presence. Further, plaintiff maintains that he was passed over for job referrals, even though he was very high on the seniority list. Additionally, plaintiff asserts that in failing to refer him for employment, defendant, acting through its business manager, David Williams, and business agent, Michael Duffy, has "otherwise disciplined" him in violation of 29 U.S.C. §§ 411(5) and 529.

Plaintiff has filed charges under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Workers International Association with the defendant and the defendant's International concerning some of his allegations. No action, however, has been taken by defendant. Further, plaintiff states that he contacted the National Labor Relations Board ("NLRB") by telephone regarding these allegations. At that time, he was informed that his complaint was a contract dispute and that the NLRB did not handle such matters.

On December 13, 1983, plaintiff brought this suit alleging a cause of action based on a breach of the duty of fair representation under the LMRA, 29 U.S.C. §§151, 158(b), and 159. Plaintiff later amended his complaint on March 16, 1984, to include a violation of the LMRDA, 19

U.S.C. §§ 411, 412, and 529. Defendant Union has moved for summary judgment on the following grounds: (1) jurisdiction over plaintiff's complaint is preempted by the exclusive jurisdiction of the NLRB; (2) the duty of fair representation owed to all collective bargaining unit members by defendant Union has not been breached by defendant in this case; and (3) defendant Union has not violated 29 U.S.C. §411(5) or 529 with respect to plaintiff in making hiring hall referrals. In addition, or in the alternative, defendant Union has moved the Court to strike plaintiff's jury demand.

Initially, defendant argues that this Court's jurisdiction over plaintiff's complaint is preempted by the exclusive jurisdiction of the NLRB. Defendant contends that plaintiff's claims that defendant Union has discriminated against him constitute an unfair labor practice under 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). In pertinent part, these sections state:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . .
>
> (2) cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . .

The Court notes that Congress intended exclusive jurisdiction over discrimination in hiring hall referrals to lie with the NLRB. Congress has entrusted administration of our federal labor policy to the NLRB. In enacting the National Labor Relations Act ("NLRA") and later the Labor Management Relations Act,

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as a different rules of substantive law.

Garner v. Teamsters Union, 346 U.S. 485, 490-91.

Thus, the NLRB has exclusive jurisdiction over matters which are arguably prohibited by § 7 of the LMRA, 29 U.S.C. § 157, or are arguably unfair labor practices prohibited by § 8 of the LMRA, 29 U.S.C. § 158. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

The Supreme Court has noted that discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 303 n.11, 94 LRRM 2759 (1977); *N.L.R.B. v. International Union of Operating Eng'rs Local 18*, 205 N.L.R.B. 901, 84 LRRM 1349 (1973), *enforced*, 500 F.2d 48, 86 LRRM 2932 (6th Cir. 1974). The NLRB has exclusive jurisdiction over discrimination in hiring hall referrals. *Farmer*, 430 U.S. at 303; *Plumbers Local 100 v. Borden*, 373 U.S. 690, 53 LRRM 2322, *reh'g denied*, 375 U.S. 872 (1963); *Iron Workers Local 207 v. Perko*, 373 U.S. 701, 53 LRRM 2327, *reh'g denied*, 375 U.S. 872 (1963); *Whatmore v. Boilermakers*

Local 85, 120 LRRM 2273, No. C. 83-1154, slip op. at 8 (N.D. Ohio Oct. 19, 1984).

Although plaintiff states that the NLRB, characterizing his claim as a contract dispute, refused to hear it, the Court notes that plaintiff was told this through an informal telephone conversation with an NLRB employee. Plaintiff has neither filed a charge with the NLRB, nor received a formal review of his charges.

If this Court were to exercise jurisdiction over this cause of action, it would involve interferring with the NLRB's exclusive jurisdiction. Accordingly, the Court finds that it is without jurisdiction to hear plaintiff's claims. Thus, the remainder of defendant Union's motion for summary judgment and/or in the alternative to strike jury demand is now moot and accordingly is denied.

It is therefore,

ORDERED that defendant Union's motion for summary judgment is granted. This Court's jurisdiction is preempted by the NLRB.

FURTHER ORDERED that plaintiff's complaint is dismissed.

/s/ Nicholas J. Walinski
SENIOR U.S. DISTRICT JUDGE

Toledo, Ohio.
February 20, 1987

APPENDIX C

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT

Case Title: Lynn L. Breninger, Plaintiff V. Sheet Metal Workers International Assoc. Defendants.

District: Northern District Of Ohio, Western Division.

Docket Number: C 83—1126.

Name of Judge: Nicholas J. Walinski.

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendant Union's Motion Summary Judgment is granted. Plaintiff's complaint is dismissed.

/s/ Nicholas J. Walinski
SENIOR U.S. DISTRICT JUDGE

CLERK JAMES S. GALLAS
(BY) DEPUTY CLERK DEAN E. WEAVER
DATE FEBRUARY 23, 1987

APPENDIX D

No. 87-3224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LYNN L. BREININGER, Plaintiff-Appellant, vs. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6, Defendant-Appellee.	)	ORDER

(Filed April 22, 1988)

BEFORE: ENGEL, Chief Judge; KENNEDY and KRUPANSKY, Circuit Judges.

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition be, and it hereby is, DENIED.

ENTERED BY ORDER
OF THE COURT

John P. Hehman, Clerk
/s/ John P. Hehman

APPENDIX E

Text of Statutes Involved

28 USC § 1337

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 USC § 11707], only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49 [49 USC § 11707], originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title [28 USC §§ 1581 et seq.].

---

29 USC § 411(a)(5)

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

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29 U.S.C. § 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this title [29 USC §§ 411 et seq.] have been infringed by any violation of this title [29 USC §§ 411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

---

29 U.S.C. § 158b(1)(A)

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USC § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

---

29 U.S.C. § 159. Representatives and elections

(a) Exclusive representatives—Employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

---

29 U.S.C. § 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 [29 USC § 412] shall be applicable in the enforcement of this section.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LYNN L. BREININGER 7310 Secor Road Petersburg, Michigan 49270, Plaintiff, vs. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION Local Union No. 6 4652 Lewis Avenue Toledo, Ohio 43612, Defendant.	)	Civil Action No. C83-1126 Judge Nicholas J. Walinski FIRST AMENDED COMPLAINT JURY DEMAND ENDORSED HEREON

• • •

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1137, 1343(4) and 28 U.S.C. §§ 2201 and 2202. This is a suit brought pursuant to 29 U.S.C. §§ 151, 158(b) and 159, based on allegations of the breach of duty of fair representation owed by the defendant union, Sheet Metal Workers International Association, Local Union No. 6, to plaintiff. Even though there is contained herein no alleged breach by an employer of a labor contract, federal jurisdiction is herein asserted in the within duty of fair representation case under 28 U.S.C. § 1337. See eg; *In re Carter*, 618 F.2d 1903 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981); *Retana vs. Apartment, Motel, Hotel,*

and Electrical Operator's Union, Local 14, AFL-CIO, 453 F.2d 1018 (9th Cir. 1982).

2. Jurisdiction of this Court is further invoked pursuant to 29 U.S.C. §§ 411, 412 and 529, known as the Landrum Griffin Act, which provides a right to a civil action for injunctive and other relief to any person whose rights have been infringed by any violation of said act.

PARTIES

3. Plaintiff, Lynn L. Breininger, is a white male citizen of the United States and a resident of the City of Petersburg in the State of Michigan. Plaintiff is and has been a member in good standing of defendant, Sheet Metal Workers International Association, Local No. 6 for approximately thirty-four (34) years up to the present time and of the collective bargaining unit described in paragraph 3, *infra*.

4. Defendant, Sheet Metal Workers International Association, Local Union No. 6, is, and at all times material hereto, was the exclusive bargaining agent for all journeymen and apprentice sheet metal workers for the following multi-employer collective bargaining unit as described in the agreement entered into by and between the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association for Toledo, Ohio and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan as follows:

COLLECTIVE BARGAINING UNIT

Section 1. The persons, firms, corporations, joint ventures, or other business entities bound by the terms

of the Agreeemnt are referred to in this Agreement as "Employer" or "Employers." The Employers and the Union by entering in to this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement.

Said defendant is a labor organization representing employees in an industry affecting interstate commerce.

COUNT ONE

CAUSE OF ACTION BASED ON BREACH OF DUTY OF FAIR REPRESENTATION — 29 U.S.C. §§ 151, 158(b), and 159

5. Pursuant to Article V of the collective bargaining agreement between the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association (the "Employer", collectively), and the defendant Sheet Metal Workers International Association, Local Union No. 6, it was agreed that the defendant union would have the responsibility for referral of its members to job sites. Article V of said agreement provides in pertinent part:

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement . . .

6. Plaintiff Breininger states that from on or about November of 1982 up to the present time, the defendant union, acting by and through its business manager, David Williams, and/or its business agent, Michael Duffy, have

referred its members to job sites, purportedly pursuant to Article V of the collective bargaining agreement, in a manner by which plaintiff has discriminatorily treated in job referrals. Plaintiff states that at all times he has been and is a duly qualified journeyman sheet metal worker.

7. Plaintiff states that he was laid off in November of 1982. On April 6, 1983, Venderbush Industrial Corporation, a contractor from outside the jurisdiction of defendant, specifically requested plaintiff's presence at the Enrico Power Unit Job No. 2657 in Newport, Michigan on Monday, April 9, 1983 at 7:30 a. m. Although the job site was located within the jurisdiction of Local 6 and despite the employer's request, the defendant, acting by and through its business manager, David Williams, referred other members to the job. On May 9, 1983, Venderbush Industrial Corporation again requested plaintiff's presence on defendant the same aforementioned job site. Another member was again referred.

8. Plaintiff states that as of July 11, 1983, he was sixth on the seniority list maintained by defendant for its out of work members. On July 12, 1983, the Fred Christen & Sons Company requested three (3) specialty sheet metal workers. Again, on July 18, 1983, the Fred Christen & Sons Company requested an additional three (3) specialty sheet metal workers from defendant. Plaintiff learned that as of August 8, 1983, he was still fifth on the defendant's seniority list.

9. Plaintiff states that the ex-business manager of defendant, Don Reams, who was laid off on or about December 31, 1982, was set up with a job by Michael

Duffy, defendant's business agent, while plaintiff was passed over.

10. Plaintiff states that he continues to be passed over by defendant for job referrals and that this practice is continuing to his detriment.

11. Plaintiff states that he filed a charge under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Workers International Association with respect to the allegations contained in paragraph 6 of this Complaint, *supra*, on or about July 5, 1983 with the defendant and the defendant's International. To date, no action has been taken by defendant. A copy of said charge is hereto annexed and marked as Exhibit "A" and made a part hereof.

12. Plaintiff states that he filed a Charge Under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Worker's International Association with respect to the allegations contained in paragraphs 7 and 8 of this Complaint, *supra*, on or about September 16, 1983 with the defendant and the defendant's International. To date, no action has been taken by defendant. A copy of said charge is hereto annexed and marked as Exhibit "B" and made a part hereof.

13. Plaintiff states that in refusing to honor employer requests for plaintiff's employment, in refusing to properly administer the job seniority list, and in refusing to process and/or acknowledge his charges, the defendant union, in its representation of plaintiff, has acted arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause.

COUNT TWO

29 U.S.C. §§ 411, 412, and 529

14. The allegations set forth in paragraphs one (1) through thirteen (13) of this complaint, *supra*, are herein incorporated by reference as if fully rewritten herein.

15. In June of 1982, the defendant local union held an election for the offices of business manager and business agent. In said election, plaintiff participated by handing out pencils advertising the former business manager, Don Reaume, and the former business agent, Bob Good. Plaintiff further states that it was generally known by the membership of defendant and by the present business manager, David Williams, and the present business agent, Michael Duffy, that he was opposed to them.

16. Plaintiff states that in failing to refer him for employment, as complained of *supra*, the defendant, acting by and through its present business manager, David Williams, and its present business agent, Michael Duffy, have "otherwise disciplined" plaintiff in violation of 29 U.S.C. § 411(5) and 29 U.S.C. § 529.

17. Plaintiff states that in making job referrals, the defendant has favored a faction of members of said union known as the "Concerned Brothers" who have been known to support and are known to support and who do support the present business manager, David Williams, and the present business agent, Michael Duffy. Plaintiff's discriminatory treatment in job referrals, as complained of *supra*, has been part of widespread, improper discipline for political opposition in violation of 29 U.S.C. 411(5) and 29 U.S.C. § 529.

18. In view of the facts as set forth, *supra*, plaintiff states that any further attempts at exhaustion would be futile.

19. Plaintiff states that as a result of the acts complained of in paragraphs one (1) through eighteen (18) of this complaint, *supra*, he has suffered great mental and emotional pain, stress, anxiety, humiliation, and embarrassment.

PRAYER FOR RELIEF

WHEREFORE plaintiff respectfully prays:

20. That a summons issue to said union to appear herein and to answer the allegations contained in this complaint and to abide by and perform such orders and decrees that this Court may make.

21. That defendant be restored to his rightful place on the defendant's out of job seniority list and to his rightful job or in the alternative for front pay until an appropriate opening becomes available, and that defendant be enjoined from any further interference with the proper administration of the job referrals.

22. That an order issue from this Court requiring said defendant to pay to plaintiff his lost wages and benefits, which have resulted from the conduct of the defendant as complained of herein.

23. That plaintiff be granted judgment in the sum of $150,000.00 compensatory damages for emotional and physical harm caused by defendant's conduct.

24. That the Court grant plaintiff all additional relief to which he may appear to be entitled.

25. That the Court grant plaintiff his costs herein including reasonable attorney fees.

Respectfully submitted,

WASSERMAN, WASSERMAN, BRYAN & LANDRY

By: /s/ FRANCIS J. LANDRY
Francis J. Landry
300 Inns of Court Building
405 N. Huron Street
Toledo, Ohio 43604
Telephone: 419-243-1239
Attorney for Plaintiff,
Lynn L. Breininger

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable in the within cause of action.

/s/ FRANCIS J. LANDRY
Francis J. Landry, Attorney for
Plaintiff, Lynn L. Breininger

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Amended Complaint Jury Demand Endorsed Hereon was sent by ordinary U.S. mail service to Jeffrey Julius, Esquire, Gallon, Kalniz & Iorio Co., L.P.A., 3161 North Republic Road, Toledo, Ohio 43615 Attorney for Defendant Sheet Metal Workers International Association, Local Union No. 6, on this 16th day of March, 1984.

/s/ FRANCIS J. LANDRY
Francis J. Landry

(2)

No. 88-124

FILED

AUG 15 1988

CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LYNN L. BRENINGER,
Petitioner,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

RESTATEMENT OF THE QUESTIONS PRESENTED

A. Whether questions concerning the alleged discriminatory operation of a hiring hall are preempted by the exclusive jurisdiction of the National Labor Relations Board?

B. Whether the alleged discriminatory operation of a hiring hall constitutes "discipline" within the meaning of Section 101(a)(5) and Section 609 of the Labor-Management Reporting and Disclosure Act?

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No. 88-124

IN THE

Supreme Court of the United States

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SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PARTIES TO PROCEEDINGS BELOW

The Respondent Union does not contest the statement of the parties participating in the proceedings before the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

OPINIONS BELOW

The Respondent Union does not contest the statement of the opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondent does not contest the statement of jurisdiction set forth in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Respondent Union does not contest the statement of the applicable statutory provisions set forth in the Petition for Writ of Certiorari.

RESTATEMENT OF THE CASE

The Respondent Sheet Metal Workers International Association, Local Union No. 6 (hereinafter referred to as the "Union") is signatory to a collective bargaining agreement with various employer-contractors, who are members of the Toledo Area Sheet Metal and Roofing Contractors Association and/or the Toledo Heating and Air Conditioning Contractors Association. Article V of this collective bargaining agreement provides that the Union shall refer sheet metal workers to employers performing work within the Union's traditional work and territorial jurisdiction upon the request of an employer.[1]

Thus, pursuant to Article V of the collective bargaining agreement, the Union maintains a non-exclusive hiring hall. The hiring hall is non-exclusive because a sheet metal worker may obtain employment in a number of ways. First, a sheet metal worker may be referred from an "out of work" list maintained by the Union. Second, a signatory employer may request that a particular sheet metal worker be referred by name. Finally, an individual may solicit and obtain employment from signatory employers through his or her own self-help efforts.[2]

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[1] Specifically, Article V, paragraph 11 of the collective bargaining agreement provides:

> The Union agrees to furnish upon request by the employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. Employers agree to confirm in writing to Local No. 6 when requesting Employees. The Union agrees not to delay the referral of Employees because of delays in mailing the request.

[2] A non-local employer (*i.e.*, a contractor who does not have a principal place of business within the Union's territorial jurisdiction) is permitted to hire two sheet metal workers without regard to the Union's "out of work" list when the employer is working in the Union's jurisdiction. This "two man rule" is also applicable if the employer requests that specifically named sheet metal workers be referred by the Union and/or if individual sheet metal workers solicit employment with the employer through their own efforts.

A sheet metal worker who wishes to be referred by the Union for employment either signs his name to the "out of work" list or calls the Union hall and has his name placed on the list. When an employer needs sheet metal workers, he contacts the Union hall and requests the particular number of sheet metal workers which he needs. Upon receiving a request for sheet metal workers from a contractor, the Union attempts to contact that individual who is first on the "out of work" list. A sheet metal worker is not required to be present at the Union hall in order to be referred for employment. Thus, the Union places a telephone call to the individual in an effort to offer him or her the referral. If the person cannot be contacted, the Union goes to the next name on the "out of work" list and attempts to contact him. This procedure continues until a person who is on the "out of work" list is contacted. Once contact is made, the referral is offered to the individual who then has the option of accepting or rejecting the employment. However, a sheet metal worker does not lose his place on the "out of work" list for refusing to accept a referral.

Upon accepting the referral, the individual is informed when and where to report for work and is given an "introductory card," which is presented to the Union's steward at the jobsite. Because of the transitory nature of employment in the construction industry, a sheet metal worker must be employed for ten consecutive days before his name is taken off the "out of work" list. An employer always reserves the right to hire or not hire a sheet metal worker referred by the Union.

In addition to the regular "out of work" list, the Union also maintains a separate list for members who wish to work under the Union's "Specialty Agreement." This Agreement is a separate addendum to the collective bargaining agreement. Work performed pursuant to the

"Specialty Agreement" is paid at a wage rate lower than that provided in the collective bargaining agreement. Therefore, work performed under the "Specialty Agreement" is strictly voluntary. Consequently, the Union cannot refer an individual under the "Specialty Agreement" unless he or she has expressly signed his or her name to the referral list maintained specifically for purposes of that agreement.

A sheet metal worker may also obtain employment when a contractor-employer specifically requests a particular individual by name.[3] When such a request is made, it is the Union's responsibility to satisfy the employer's wishes and get the requested employee out to the jobsite. If the Union is unable to contact the employee or the employee refuses to accept the referral, the Union will follow the procedure outlined previously and proceed to refer sheet metal workers off the "out of work" list.

Finally, a sheet metal worker always retains the right to solicit employment through his own efforts. No penalty is imposed upon a sheet metal worker for personally soliciting work from an employer.

The Petitioner in the instant matter, Lynn L. Breininger, is and has been a member of the Union since the early 1950's. He is familiar with the collective bargaining agreement and with the collective bargaining process. Furthermore, he is personally familiar with and understands all aspects of the Union's non-exclusive referral procedure. Petitioner Breininger is also

[3] An employer may also request that a worker possess a particular skill. Thus, for example, an employer contractor may request that the sheet metal workers referred to it be certified welders. Because all sheet metal workers are not certified welders, the Union will search the "out of work" list and offer the referral to the first certified welder on the list.

personally familiar with and understands the self-solicitation method of obtaining employment. He has had his name placed on the "out of work" list and has been referred off the list by the Union for employment. Furthermore, he has also solicited and obtained employment through his own efforts. However, Petitioner Breininger never signed the "out of work" list maintained pursuant to the Union's specialty agreement. Thus, he is ineligible for sheet metal work referrals covered by the provisions of that agreement.

The Union has repeatedly called Petitioner Breininger for job referrals when his name has come up on the "out of work" list. Indeed, when he has called the Union to determine his place on the "out of work" list, he has always been so informed. The Union has never refused any of his requests to place his name on the "out of work" list. Furthermore, the Union has never interfered with his efforts to solicit sheet metal work employment on his own.

On December 13, 1983, the Petitioner brought suit against the Union in the United States District Court for the Northern District of Ohio upon the theory that the Union's alleged discriminatory referral practices constituted a breach of the Union's duty of fair representation. An amended complaint was filed by Petitioner on March 16, 1984, wherein Petitioner asserted that the Union's alleged discriminatory referral practices constitued "discipline" in violation of Section 101(a)(5) of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter referred to as the "LMRDA"), 29 U.S.C. Section 411(a)(5) and Section 609 of the LMRDA, 29 U.S.C. Section 529.

The Union filed a Motion for Summary Judgment on September 10, 1986. Therein, the Union asserted as grounds for the motion that: (1) the District Court's

jurisdiction was preempted by the exclusive jurisdiction of the National Labor Relations Board, (2) the Union did not otherwise breach its duty of fair representation, and (3) the Union had not violated any right cognizable under Section 101(a)(5) and/or Section 609 of the LMRDA upon making hiring hall referrals.

The District Court granted the Union's Motion for Summary Judgment in an Opinion and Order dated February 20, 1987. *See*, Petition Appendix at A4. The District Court found that Petitioner's claims were preempted by the exclusive jurisdiction of the National Labor Relations Board and dismissed Petitioner's amended complaint. *See*, Petition Appendix at A8-A10.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. On March 1, 1988, the Court of Appeals affirmed the District Court, holding that Petitioner's claims regarding alleged discriminatory hiring hall referrals were within the exclusive competence of the National Labor Relations Board and that hiring hall discrimination does not constitute "discipline" violative of the provisions of the Labor Management Reporting and Disclosure Act. *See*, Petition Appendix at A1. For the reasons which follow, the Petition for Writ of Certiorari must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER'S CAUSE OF ACTION IS PREEMPTED BY THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

The allegations contained in the Petition reveal that Petitioner takes issue with that portion of the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's dismissal of Petitioner's action on federal preemption grounds. *See*, Petition Appendix at A2. Specifically, the District Court and the Court of Appeals found that Petitioner sought relief from alleged discriminatory job referral practices conducted by Respondent Union, which practices were within the exclusive jurisdiction of the National Labor Relations Board. *See*, Petition Appendix at A1-A3, A4-A10, A16-A23. The discussion which follows will demonstrate that the Court of Appeals' affirmance of the District Court's dismissal was entirely consistent with prior decisions of this Court and therefore, the Petition must be dismissed.

This Court has long held that the National Labor Relations Board has *exclusive* jurisdiction over matters which are arguably protected by Section 7 of the Labor Management Relations Act of 1947 (hereinafter referred to as the "LMRA"), 29 U.S.C. Section 157, and over matters which are arguably prohibited by Section 8 of the LMRA, 29 U.S.C. Section 158. *See, San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The express rationale of this Court's *Garmon* decision was the prevention of even the potential of conflict with the statutory scheme developed by Congress to regulate the relations between industrial management and its work force. *See, Garmon*, 359 U.S. at 239-240. Thus,

Congress created a specialized body (*i.e.*, the National Labor Relations Board) with specially designed procedures for the express purpose of achieving uniform application of the national labor laws and avoiding the inevitable conflicts "likely to result from a variety of local procedures and attitudes towards labor controversies." *See, Garmon*, 359 U.S. at 242-243. Moreover, this Court established in *Garmon*, that even where the National Labor Relations Board fails to assume jurisdiction over a matter within its competence, both state and federal courts are prohibited from asserting their influence to decide the matter. *See, Garmon*, 359 U.S. at 242-243. Moreover, this Court established in *Garmon*, that even where the National Labor Relations Board fails to assume jurisdiction over a matter within its competence, both state and federal courts are prohibited from asserting their influence to decide the matter. *See, Garmon*, 359 U.S. at 245-246.

Consistent with the *Garmon* doctrine, this Court has made it abundantly clear that Union discrimination against individuals in regard to matters involving employment opportunities is subject to the preemption principles detailed in *Garmon*. Specifically, this Court has unequivocally held that court actions against labor organizations seeking relief from discriminatory referral practices are preempted by the exclusive competence of the National Labor Relations Board. *See, Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977).

In *Borden*, this Court noted that discriminatory referral practices are arguably prohibited by Section 8(b)(1)(A) of the LMRA, 29 U.S.C. Section 158(b)(1)(A) and Section 8(b)(2) of the LMRA, 29 U.S.C. Section

158(b)(2). *See, Borden*, 373 U.S. at 694. Notwithstanding that the claimant in *Borden* contended that the action therein was grounded upon an internal dispute between a union and a member unrelated to employment matters for which the National Labor Relations could not afford relief, this Court nevertheless held that "[t]he 'crux' of the action . . . concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction." *See, Borden*, 373 U.S. at 697. The fact that the action was grounded upon contract and tort law was found to be insignificant, since "[i]t is not the label affixed to the cause of action . . . that controls the determination of the relationship between state and federal jurisdiction." *See, Borden*, 373 U.S. at 698. In sum, this Court concluded that the conduct challenged in *Borden*, "whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." *See, Borden*, 373 U.S. at 698.[4]

In light of the previous decisions of this Court, it is clear that the Court of Appeals and the District Court made a routine application of the law by dismissing Petitioner's action. In this regard, a review of

[4] This Court's decision in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), is of similar import. Thus, in *Farmer*, this Court noted that to avoid the impact of the preemption doctrine in cases involving union discrimination in employment opportunities, it is essential that the claim for which relief is sought "be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *See, Farmer*, 430 U.S. at 305. *See also, Local 207, International Association of Bridge, Structural and Ornamental Iron Workers v. Perko*, 373 U.S. 701 (1963); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

Petitioner's amended complaint makes clear that the crux of Petitioner's cause of action concerned alleged discriminatory operation by the Union of the referral system. *See*, Petition Appendix at A16. However, it is beyond dispute that the operation of a referral system by a union in a discriminatory manner is in fact prohibited by the LMRA. *See, Borden*, 373 U.S. at 694. Therefore, there is no question but that resolution of Petitioner's cause of action was directly related to employment discrimination and would have interfered with the exclusive jurisdiction of the National Labor Relations Board. *See, Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 305 (1977).[5]

Therefore, it is clear that the decisions of the courts below are in accord with the previous mandates of this Court. Petitioner has presented no reasons indicating why the instant case is one of public importance and indeed, has failed to present any *real* conflict of authority between the federal courts of appeal. Consequently, there is no occasion for this Court to exercise its discretionary power to grant certiorari and dismissal of the Petition is more than warranted.

[5] Petitioner's argument, that the preemption doctrine is applicable only to state court claims, *see*, Petition at p. 5, is specious and not worthy of any lengthy discussion. In this regard, this Court in *Garmon* made clear that federal courts are also prohibited from exercising jurisdiction which would interfere with the exclusive competence over labor relations matters enjoyed by the National Labor Relations Board. *See, Garmon*, 359 U.S. at 245.

A. Petitioner's allegation of a breach of the duty of fair representation does not prevent application of the preemption doctrine.

Petitioner argues that because he has alleged in his amended complaint that Respondent Union breached its duty of fair representation by allegedly discriminating against him through discriminatory referrals, the lower courts erred in dismissing his action. However, Petitioner's argument is without merit and demonstrates a lack of understanding of the interrelationship between the national labor laws and the precedent established by this Court.

It is well-settled that federal courts retain jurisdiction to remedy breaches of a union's duty of fair representation. *See, Vaca v. Sipes*, 386 U.S. 171 (1967). In this regard, this Court has recognized that a labor organization has a duty to avoid arbitrary, discriminatory and bad faith conduct in the negotiation, administration and enforcement of collective bargaining agreements. *See, Vaca*, 386 U.S. at 176-188. Because a fair representation suit frequently "require[s] review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery", matters which are not normally within the jurisdiction of the National Labor Relations Board, this Court has emphasized that such suits are not preempted by the LMRA and/or the jurisdiction of the Board. *See, Vaca*, 380 U.S. at 180-181.

However, a plaintiff may not avoid the preemptive effect of the National Labor Relations Board's exclusive and primary jurisdiction by framing his cause of action as a fair representation case. Thus "[i]t is not the label affixed to the cause of action ... that controls the

determination" of whether a federal court's jurisdiction is preempted. *See, Borden*, 373 U.S. at 698. Indeed, this Court has recently reaffirmed this principle. In *Communications Workers of America v. Beck*, 56 U.S.L.W. 4857 (U.S. June 29, 1988), this Court noted that "[e]mployees ... may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." *See, Beck*, 56 U.S.L.W. at 4859. This Court characterized the plaintiffs' claim in *Beck* as one seeking relief for a breach of the duty of fair representation because the union therein *negotiated* and *enforced* a collective bargaining agreement which did not serve the plaintiffs' interests. *Id.* Thus, it is clear that conduct unrelated to the negotiation, administration and enforcement of a collective bargaining agreement, which is arguably protected or prohibited by the LMRA is conduct subject to the National Labor Relations Board's exclusive jurisdiction. Consequently, discrimination in the operation of a hiring hall referral system does not implicate the duty of fair representation. *See, Hackenburg v. International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982).

Indeed, this Court has previously affirmed a district court decision involving the very issue present in the instant matter. *See, Tyree v. Edwards*, 287 F. Supp. 589 (D. Alaska 1968), *aff'd per curiam sub nom., Alaska v. International Union of Operating Engineers*, 393 U.S. 405 (1969). In *Tyree*, the district court overturned a state court injunction issued against a labor organization which prohibited the union from operating a discriminatory referral system. *See, Tyree*, 287 F. Supp. at 594-595. The district court held that the state court's jurisdiction to regulate discriminatory referral practices was preempted, notwithstanding that such conduct

could also breach its duty of fair representation. *Id.* at 595. Upon direct appeal, this Court summarily affirmed. *See, Alaska v. International Union of Operating Engineers*, 393 U.S. 405 (1969).

The Petitioner argues that the Court of Appeals decision below is somehow at odds with this Court's decision in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). However, in *Lockridge*, this Court expressly declined to consider the effect of the *Garmon* preemption doctrine. *Id.* at 299. Nevertheless, it remains clear that the duty of fair representation arises only in the context of the negotiation, administration and enforcement of a collective bargaining agreement. *See, Vaca v. Sipes, supra; Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). Conduct by a labor organization outside these areas does not implicate the organization's duty of fair representation, because the duty arises out of a union's status as exclusive representative for the purposes of collective bargaining. *See, Steele v. Louisville & Nashville Railroad*, 332 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Foremen*, 323 U.S. 210 (1944). Thus, where a union engages in activities unrelated to collective bargaining, it is not acting as an employee's "exclusive representative" and consequently there is simply no duty to breach. A union's conduct is then subject solely to the mandates of the national labor laws.[6]

[6] In light of these principles, Petitioner's alleged conflict between the Court of Appeals' decision below and that Court's decision in *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985) is unquestionably non-existent, because the conduct alleged to breach the duty of fair representation therein involved the *negotiation* of a collective bargaining agreement. *Id.* at 518.

Petitioner has therefore clearly failed to show how the decisions of the lower courts were inconsistent with the prior decisions of this Court regarding the preemption doctrine and the duty of fair representation. The conduct which Petitioner challenges unmistakably constitutes discrimination in the operation of a referral system. A review of the amended complaint filed by Petitioner in the District Court reveals a complete lack of any allegation that the Union had violated its duty of fair representation in the negotiation, administration and enforcement of a collective bargaining agreement. *See,* Petition Appendix at A16-A23. Indeed, Petitioner's admission that no breach of the collective bargaining agreement had occurred highlights the fact that there was never any occasion for the Union to exercise its duty of fair representation. Therefore, it is clear that Petitioner's mere framing of his complaint to allege a breach of the duty of fair representation does not prevent the application of the preemption doctrine, as the District Court and the Court of Appeals correctly recognized. Indeed, in light of this Court's decision in *Borden*, dismissal of Petitioner's cause of action was compelled. Consequently, this Court must deny the Petition.

II. THE ALLEGED DISCRIMINATORY OPERATION OF A REFERRAL SYSTEM DOES NOT CONSTITUTE "DISCIPLINE" WITHIN THE MEANING OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.

Petitioner also takes issue with the Court of Appeals' holding that discrimination in employment referrals through a union hiring hall does not constitute "discipline", within the meaning of Section 101(a)(5) of the LMRDA, 29 U.S.C. Section 411(a)(5) and Section 609 of the LMRDA, 29 U.S.C. Section 529. In this regard, Petitioner's sole argument is that the decision is in alleged conflict with a prior decision of the United States Court of Appeals for the Sixth Circuit in *Murphy v. International Union of Operating Engineers, Local 18*, 794 F.2d 114 (6th Cir. 1985). Thus, Petitioner fails to point to any *real* conflict of authority between the federal courts of appeals which would warrant the exercise of this Court's discretionary power to review upon certiorari. *See, Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Wayne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

In *Finnegan v. Leu*, 456 U.S. 431 (1982), this Court construed the term "otherwise disciplined" contained in Section 101(a)(5) and Section 609 of the LMRDA as "refer[ing] only to punitive actions diminishing *membership* rights . . ." *Id.* at 438. In this regard, this Court noted that the aforementioned provisions were intended to secure the rights of union members in relation to their status as members, and not to secure other rights related to a union member's employment. *Id.* at 436-438.

The federal courts of appeals have consistently held that loss of referral opportunities through a union's referral system does not constitute "discipline" within the scope of the LMRDA. Thus, in *Hackenburg v. International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982), the Court of Appeals for the Tenth Circuit held that in light of *Finnegan*, the term "otherwise disciplined" was confined "to retaliatory actions that affect a union member's rights or status as a member of the union." *Id.* at 1239. The court described the loss of referral opportunities as a sanction which was employment related "rather than internal union related." *Id.* at 1240. Similarly, in *Turner v. Local Lodge 455*, 755 F.2d 866 (11th Cir. 1985), the Court of Appeals for the Eleventh Circuit held that loss of referral opportunities did not affect the plaintiffs' status as members of the union "because one is not required to belong to the union to be carried on the out of work list and be referred to prospective employers when one's turn arrives." *Id.* at 869.[7] Therefore, because referrals through a hiring hall system are available to members and non-members alike, referrals are consequently not a function of union membership. It is then clear that alleged discrimination in referrals does not affect any union membership rights which implicate the LMRDA.

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[7] A referral system must be open to union members and non-members alike. A labor organization violates Section 8(b)(2) of the LMRA, 29 U.S.C. Section 158(b)(2) when it refuses to refer non-members through the referral system. *See e.g., United Association of Journeymen, Local 633*, 178 N.L.R.B. 396, *enf'd*, 436 F.2d 1386 (6th Cir. 1971). *See also, Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961).

Petitioner's argument in the instant matter is that the decision of the Court of Appeals below conflicts with its prior decision in *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114 (6th Cir. 1985). However, it is clear that in *Murphy* the Court of Appeals for the Sixth Circuit affirmed the district court's holding that there was no "discipline" through the improper administration of a referral system. *Id.* at 122. The Court of Appeals held that the "mere unsystematic manipulation, as opposed to a total foreclosure of such job referrals, may not constitute 'discipline' . . ." *Id.* Thus, the *Murphy* decision is consistent with the decisions of the other federal courts of appeals which have considered whether discriminatory job referrals constitute "discipline" for purposes of the LMRDA.

In light of the applicable precedent detailed above, it is clear that the courts below properly dismissed Petitioner's LMRDA claim. Thus, there is no reason for this Court to exercise its discretion to review and the Petition must be dismissed.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 88-124

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

LYNN L. BREININGER, PETITIONER

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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2788

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act preempts federal court jurisdiction over a union member's claims that his union breached its duty of fair representation and violated the Labor Management Reporting and Disclosure Act by discriminating against him in job referrals.

2. Whether a union's refusal to refer a member to jobs, as a result of his political opposition to the union's leadership, gives rise to a cause of action under Sections 101(a)(5), 102, and 609 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5), 412, and 529.

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Miscellaneous:

Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 Ga. L. Rev. 383 (1975) 15
Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference with Employment Opportunities*, 114 U. Pa. L. Rev. 700 (1966) 15
Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L. Rev. 727 (1969) 15

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-124

LYNN L. BREININGER, PETITIONER

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Sheet Metal Workers Local Union No. 6 (the Union) represents sheet metal workers in a multi-employer bargaining unit in the Toledo, Ohio, area. In a collective bargaining agreement, the Union has agreed to refer sheet metal workers to employers in response to their requests.[1] The Union attempts to honor an employer's re-

[1] Article V of the collective bargaining agreement provides:

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. Employers agree to confirm, in writing, to Local No. 6 when requesting employees. The Union

quest for particular employees (Pet. App. A6). However, if the employer does not request particular individuals or if individuals requested are unavailable, the Union refers workers from an "out-of-work list" (*id.* at A5-A6). The Union begins at the top of the list and attempts to contact workers in the order they appear. A member who is contacted may accept the employment or decline and retain his place on the list. The Union continues down the list until it has obtained a sufficient number of workers to satisfy the employer's request. *Id.* at A6. A sheet metal worker is not required to seek work exclusively through the out-of-work list, but rather may solicit employment directly from sheet metal contractors (*id.* at A5).

In this action, petitioner Breininger, a member of the Union, has alleged that the Union has refused to honor employer requests for his services and has unjustifiably passed him over in making referrals from the out-of-work list. Pet. App. A18-A20. His amended complaint states two legal theories. First, the complaint alleges that the Union has breached its "duty of fair representation" by acting "arbitrarily, discriminatorily, and/or in bad faith" in denying petitioner referrals for employment and refusing to process his internal union grievances challenging this mistreatment (Pet. App. A18-A20). Second, the complaint alleges that petitioner opposed the incumbent union leadership in an election campaign and that his discriminatory treatment in job referrals "has been part of widespread, improper discipline for political opposition in violation of" Sections 101(a)(5) and 609 of the Labor Management Reporting and Disclosure Act (LMRDA), 29

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agrees not to delay the referral of employees because of delays in mailing the request.

If the Union does not provide enough workers within 48 hours, an employer may fill the positions itself.

U.S.C. 411(a)(5) and 529 (*id.* at A21). The Union has denied that it has engaged in any discrimination against petitioner.

2. After discovery, the district court granted a motion by the Union for summary judgment and dismissed the complaint (Pet. App. A4-A10). The court held that all of petitioner's claims were within the exclusive jurisdiction of the National Labor Relations Board (NLRB). Applying the general rule of preemption set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the district court determined that "discrimination in hiring hall referrals constitutes an unfair labor practice under" Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), 158(b)(2), and concluded that "[t]he NLRB has exclusive jurisdiction over discrimination in hiring hall referrals." Pet. App. A9.

3. In a brief *per curiam* opinion, the court of appeals affirmed (Pet. App. A1-A3). The court of appeals agreed with the district court that "union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB" (Pet. App. A2), adding that it was "of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of the LMRDA's bill of rights" (*ibid.*). The court of appeals also concluded that petitioner's fair representation claim was insufficient because petitioner had not "affirmatively alleg[ed] that his *employer* breached the collective bargaining agreement" (*ibid.*).

Finally, the court of appeals ruled that petitioner's LMRDA claim was without merit on the ground that "[d]iscrimination in the referral system * * * does not constitute 'discipline' within the meaning of LMRDA" (Pet. App. A3). Relying on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), the court stated that the LMRDA was "intended to

secure the rights of members in their status as union members and does not secure other rights related to a member's employment." Pet. App. A3. The court concluded that "[h]iring hall referrals are not a function of union membership since referrals are available to non-members as well as to members" (*ibid.*).

DISCUSSION

The court of appeals' holding that the NLRA preempts federal jurisdiction over petitioner's fair representation and LMRDA claims conflicts with decisions of this Court, other courts of appeals, and other panels of the Sixth Circuit. We believe that further review by this Court is warranted to resolve this conflict. In our view, the court of appeals also erred in concluding that the reasoning of *Finnegan* v. *Leu, supra,* forecloses petitioner's LMRDA claim, as that claim was expressed in the complaint.

1. *Garmon, supra,* states the general rule regarding the scope of the NLRB's exclusive jurisdiction (359 U.S. at 245):

> When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *.[2]

As both lower courts found, petitioner's fair representation and LMRDA claims fall within the scope of this general rule. Petitioner has alleged that the Union denied him referrals because of his intra-union political activity.

[2] Accord, *e.g., Local 100, United Ass'n of Journeymen* v. *Borden,* 373 U.S. 690, 697 (1963); *Iron Workers* v. *Perko,* 373 U.S. 701, 705 (1963); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 302 (1971); *Farmer* v. *United Brotherhood of Carpenters,* 430 U.S. 290, 305 (1977).

If it occurred, such discriminatory conduct would at least arguably violate Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), which prohibits a union both from restraining or coercing employees in the exercise of their rights to engage in union activity and from breaching its duty of fair representation.[3]

However, *Garmon*'s general rule is not absolute. This Court has recognized exceptions for various categories of cases as to which "it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca* v. *Sipes,* 386 U.S. 171, 179 (1967). See *Farmer* v. *Carpenters,* 430 U.S. at 296-297. The court of appeals erred, in our view, when it failed to recognize that each of the claims set forth in petitioner's complaint was subject to a well-established exception to the *Garmon* rule.

a. In *Vaca* v. *Sipes, supra,* an employee who had been discharged by his employer claimed that his union had breached its duty of fair representation by failing to exhaust contractual grievance procedures to obtain his reinstatement. The Court held that this claim was not within the NLRB's exclusive jurisdiction—even though the Board had previously characterized a breach of the duty of fair representation as an unfair labor practice under the NLRA. The Court reasoned that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that

[3] *Local 100, United Ass'n of Journeymen* v. *Borden,* 373 U.S. 690, 697 (1963). See *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 40 (1954) (NLRA designed "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"); *Vaca* v. *Sipes,* 386 U.S. 171 (1967) (assuming breach of duty of fair representation is arguably subject to the NLRA); pp. 9-10, *infra.*

purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation." 386 U.S. at 180-181.[4] The Court also found that the duty of fair representation was a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (*id.* at 182). Noting that the Board's General Counsel has unreviewable discretion to refuse to institute unfair labor practice proceedings, the Court was unwilling to assume that Congress intended to deny employees their traditional judicial remedy for a breach of the duty of fair representation. *Id.* at 183. Finally, the Court cited "intensely practical considerations" in support of its conclusion that fair representation claims were not preempted (*ibid.*). Claims that a union had breached its duty of fair representation would often arise in employees' suits to enforce collective bargaining agreements, the Court explained, so that it would be anomalous and unwieldy to preclude courts from adjudicating those fair representation issues in such actions. *Id.* at 183-187.

Since *Vaca* v. *Sipes*, this Court, other courts of appeals, and other panels of the Sixth Circuit have agreed that fair representation claims are not within the NLRB's exclusive jurisdiction. *E.g.*, *Communications Workers* v. *Beck*, No. 86-637 (June 29, 1988), slip op. 5-6; *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lock-*

[4] The Court explained that courts had developed the fair representation doctrine before the Board acquired statutory jurisdiction over union activities and before the Board first ruled that breaches of the duty of fair representation were unfair labor practices; that, rather than developing the fair representation doctrine itself, the NLRB had adopted that doctrine as it had been applied in the courts; and that there was doubt as to whether the Board had any more expertise than courts with respect to issues arising in fair representation cases. *Id.* at 181.

ridge, 403 U.S. 274, 299 (1971); *Storey* v. *Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985); *Journeymen Pipe Fitters Local 392* v. *NLRB*, 712 F.2d 225, 228-229 (6th Cir. 1983); *Lewis* v. *Local Union No. 100 of the Laborer's International Union*, 750 F.2d 1368, 1375-1377 (7th Cir. 1984); *In re Carter*, 618 F.2d 1093, 1104 (5th Cir. 1980); *Beriault* v. *Local 40, Super Cargoes & Checkers*, 501 F.2d 258, 263-265 (9th Cir. 1974); *Smith* v. *Local No. 25, Sheet Metal Workers Int'l Ass'n*, 500 F.2d 741, 745-749 (5th Cir. 1974). To our knowledge, no other court has held that a properly pleaded fair representation claim is preempted by the NLRA.[5]

The grounds advanced by the court of appeals to justify its contrary decision are not well founded:

First, court jurisdiction over fair representation claims is not limited to cases in which an employee "affirmatively allege[s] that his *employer* breached the collective bargaining agreement" (Pet. App. A2). In *Communications Workers* v. *Beck, supra,* this Court upheld jurisdiction over a fair representation claim although no allegation of employer breach was or could have been made. And in *Lockridge,* 403 U.S. at 299, the Court observed, "[A]n action seeking damages for injury inflicted by a breach of a union's duty of fair representation [is] judicially cognizable in any event, that is, even if the conduct complained of [is] arguably protected or prohibited by the

[5] The court of appeals erred in suggesting that *Journeymen Pipe Fitters Local 392, supra,* and *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 779 F.2d 497 (9th Cir. 1985), aff'd, No. 85-2079 (Feb. 23, 1988), required the submission of fair representation claims to the Board. See Pet. App. A2. Indeed, in the former case, the court observed that "[u]nder current law, an employee who has not been fairly represented may seek relief in more than one forum * * *." 712 F.2d at 228. *Laborers Health & Welfare Trust Fund* did not address the issue.

National Labor Relations Act and *whether or not the lawsuit [is] bottomed on a collective agreement*" (emphasis added). Other courts of appeals and another panel of the Sixth Circuit have agreed that *Vaca* "establishes a broad immunity from preemption for all fair representation suits," not just cases that arise out of a breach of a collective bargaining agreement. *Lewis* v. *Local Union No. 100,* 750 F.2d at 1376. Accord, *e.g., Storey,* 759 F.2d at 523; *Beriault,* 501 F.2d at 264-266; *Smith,* 500 F.2d at 748-749.[6]

Second, *Local 100, Journeymen* v. *Borden, supra,* does not require dismissal of petitioner's claims (see Pet. App. A2). *Borden* held that the NLRA preempted the application of *state* law to a claim arising from discrimination in referrals, and the statement there that the NLRB's exclusive jurisdiction depends on the "conduct" in issue, as opposed to the "label affixed to the cause of action" (373 U.S. at 698), must be understood in that context. Even though fair representation claims based on *federal* law can

[6] This Court first recognized the fair representation doctrine in cases involving the negotiation of agreements which discriminated against certain union members (*e.g., Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944)), and the duty of fair representation is now understood to apply to the negotiation, administration, and enforcement of collective agreements (*Beck,* slip op. 6).

The court of appeals relied upon *Bagsby* v. *Lewis Brothers, Inc.,* 820 F.2d 799 (6th Cir. 1987). The plaintiff in that action sought relief in court for a breach of a collective bargaining agreement without first exhausting contractual grievance procedures. In that type of case, an employee concededly cannot prevail without demonstrating both that the union has breached the duty of fair representation in presenting the employee's grievance and that the employer has breached the collective bargaining agreement. See *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 570-571 (1976); *Clayton* v. *Automobile Workers,* 451 U.S. 679, 681, 685-687 (1981). A showing of employer breach is not necessary, however, where the relief an employee is seeking is not dependent on a breach of contract.

involve conduct that is arguably subject to the NLRA, those claims may nevertheless be judicially vindicated because "the particular *rule of law* sought to be invoked * * * is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Lockridge,* 403 U.S. at 297-298 (emphasis added).[7]

In short, if petitioner's fair representation claim was colorable, the district court had jurisdiction under 28 U.S.C. 1331 and 1337 to reach the merits. In our view, the amended complaint did state such a claim. When a collective bargaining agreement establishes a referral system for employment of members of the bargaining unit, a union's operation of that system represents the "administration" of the collective bargaining agreement and is thus arguably within the scope of the union's duty of fair representation. *Beck,* slip op. 6. Several courts of appeals and the NLRB have held that a union breaches its duty to the members of a bargaining unit when it discriminates or acts arbitrarily or in bad faith in the operation of an exclusive hiring hall or referral system. *Smith* v. *Local 25,* 500 F.2d at 748-749; *Beriault* v. *Local 40,* 501 F.2d at 264-266; *Lewis* v. *Local 100, Laborers,* 750 F.2d at 1376; *Operating Engineers, Local 406 (Ford, Bacon & Davis),* 262 N.L.R.B. 50, 51, 57 (1982), enforced, 701 F.2d 504, 508-509 (5th Cir. 1983); *Pipefitters Local 392 (Kaiser Engineers),* 252 N.L.R.B. 417, 421-422 (1980); *Cell-Crete Corp.,* 288 N.L.R.B. No. 32 (Mar. 29, 1988). The Board has explained that "a labor organization must conform with and apply lawful contractual standards in the operation of the [hiring] hall and any

[7] As the Court cautioned in *Beck,* slip op. 6, "Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." See also *Lockridge,* 403 U.S. at 301.

departure from such standards which results in a denial of employment to an applicant for referral" constitutes the kind of "unfair, irrelevant, or invidious" treatment which violates the union's duty of fair representation—absent a showing that "the action was necessary for the effective performance of [the union's] function in representing its constituency." *Operating Engineers Local 406, supra,* 262 N.L.R.B. at 57. Though the referral system in this case may be nonexclusive, petitioner's fair representation claim was arguably valid and should have been decided on the merits, rather than through the application of the preemption doctrine.[8]

[8] A referral system is "exclusive" if the union has exclusive authority to provide workers to employers, even if that authority is limited to a specified period of time, such as 24 or 48 hours, or to a specified percentage of the work force. *Carpenters Local 608 (Various Employers),* 279 N.L.R.B. 747, 754 (1986), enforced on other grounds, 811 F.2d 149 (2d Cir. 1987), cert. denied, No. 86-1760 (Oct. 5, 1987). In this case, the district court found that employees were free to seek employment on their own, and petitioner does not appear to dispute that finding. Though the cases cited in text are not squarely on point with respect to such a nonexclusive system, at least a substantial argument could be made that, when a union undertakes to establish an optional referral system pursuant to the terms of a collective bargaining agreement as to which it is the employees' exclusive representative, its duty of fair representation extends to the operation of the referral system. The Board has held that a union operating a nonexclusive referral system violates Section 8(b)(1)(A) of the NLRA if it refuses to refer an employee because of the employee's exercise of rights protected by Section 7, 29 U.S.C. 157. See *Chauffeurs' Union, Local 923 (Yellow Cab),* 172 N.L.R.B. 2137 (1968); *Hoisting & Portable Engineers, Local 4 (Carlson Corp.),* 189 N.L.R.B. 366, 367 (1971), enforced, 456 F.2d 242 (1st Cir. 1972). It has not, as yet, ruled directly on whether such conduct would also violate the union's duty of fair representation. But see *Bricklayers' Local 8,* 235 N.L.R.B. 1001, 1007 (1978); *Carpenters Local 1016 (Bertram Constr.),* 272 N.L.R.B. 539 (1984). See also *Carpenters Local 608,* 279 N.L.R.B. at 747 n. 1 (finding an exclusive system, and thus declining to rely on an ALJ's conclusion

b. The court of appeals also erred in holding that petitioner's LMRDA claim was preempted.[9] In *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971), a union member claimed that he had been expelled from the union in violation of Section 101(a)(5) of the Act, 29 U.S.C. 411(a)(5). The union argued that, because the suit involved a claim that the union had discriminated in job referrals, the action was subject to the NLRB's exclusive jurisdiction. 401 U.S. at 239. This Court concluded that this argument had "no merit" (*ibid.*). After reviewing the principles underlying the preemption doctrine, the Court found that Hardeman's LMRDA claim implicated none of those principles. *Id.* at 240. The courts of appeals have uniformly concluded that a variety of LMRDA claims are not preempted. *Schmid* v. *United Brotherhood of Carpenters,* 773 F.2d 993, 995 (8th Cir. 1985); *Quinn* v. *DiGiulian,* 739 F.2d 637, 642-644 (D.C. Cir. 1984); *Vandeventer* v. *Local Union No. 513 of the International Union of Operating Engineers,* 579 F.2d 1373, 1377-1378 (8th Cir.), cert. denied, 439 U.S. 984 (1978); *Keene* v. *International Union of Operating Engineers, Local 624,* 569 F.2d 1375, 1379 (5th Cir. 1978). We believe, therefore, that the court of appeals erred when it held that petitioner's claim was preempted regardless of whether the

that the duty of fair representation attaches to administration of a nonexclusive system). See also *Hines* v. *Anchor Motor Freight,* 424 U.S. 554, 564 (1976) (duty of fair representation is equal in scope to authority conferred on exclusive bargaining agent by the NLRA). Because the lower courts in this case held that petitioner's fair representation claim was preempted, they did not reach these issues. If the Court were to grant review and reverse with respect to preemption, these issues could appropriately be addressed on remand.

[9] Although the court of appeals' opinion is not entirely clear, we read it as dismissing petitioner's LMRDA claim on two alternative grounds: (1) preemption and (2) the absence of a showing of "discipline" within the meaning of the Act.

Union's alleged discrimination was "described * * * as a violation of the LMRDA's bill of rights." Pet. App. A2.

c. The court of appeals' decision that petitioner's fair representation and LMRDA claims were within the exclusive jurisdiction of the NLRB is a substantial departure from previously settled preemption doctrine. The weight of authority on the other side of this issue and the brevity of the court's reasoning may deprive this decision of lasting significance. But especially in view of the court of appeals' decision to publish its opinion, as well as its mistaken reliance on the *Borden* decision, we believe that review by this Court—perhaps even summary review—is appropriate to resolve the conflict between this decision and the decisions of this Court and other courts of appeals.

2. The court of appeals also held that petitioner's LMRDA claim was invalid on its merits because petitioner "did not demonstrate that he was improperly 'disciplined,' a crucial element to a LMRDA claim." Pet. App. A3. Relying principally on *Finnegan* v. *Leu, supra,* the court stated that the LMRDA "is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment" and that "[h]iring hall referrals are not a function of union membership" (Pet. App. A3). In our view, the reasoning of *Finnegan* v. *Leu* does not justify the court of appeals' holding. Moreover, whether or not the complaint alleged that petitioner was "disciplined," it may state an independent claim based upon an alleged infringement of petitioner's rights within the meaning of Section 102 of that Act, 29 U.S.C. 412.

Section 101(a) of the LMRDA, 29 U.S.C. 411(a), establishes a "bill of rights" for union members. Among those rights are the right to free speech and the right to specified procedural due process before one is "fined, suspended,

expelled, or otherwise disciplined" by a union. 29 U.S.C. 411(a)(2), 411(a)(5). Under Section 102 of the Act, 29 U.S.C. 412, a person whose rights "have been infringed" by a violation of these provisions may seek relief in a federal district court. Section 609 of the Act, 29 U.S.C. 529, makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter [29 U.S.C. 401-531]." A violation of Section 609 is also actionable under Section 102.

Citing all of these provisions, petitioner's amended complaint alleges in essence that the Union has "disciplined" him for his political activities by discriminating against him in job referrals (Pet. App. A21). It concludes (*ibid.*):

> Plaintiff's discriminatory treatment in job referrals * * * has been part of widespread, improper discipline for political opposition in violation of 29 U.S.C. 411(5) and 29 U.S.C. 529.

In our view, *Finnegan* v. *Leu* does not foreclose such a claim.

In *Finnegan,* a newly elected president of a local union discharged the local's business agents and appointed replacements loyal to him. The agents who had been discharged brought an action under the LMRDA, alleging that they had been "otherwise disciplined" for their political support for the former president in violation of Section 609. This Court affirmed the dismissal of the complaint, holding that "removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609 [of the LMRDA]." 456 U.S. at 439. The Court also held that the discharges could not be challenged by alleging an "infringement" of the agents' rights within the meaning of Section 102 of the Act, since those rights were not intended to "restrict the freedom of

an elected union leader to choose a staff whose views are compatible with his own." *Id.* at 441.

The court of appeals' decision extends *Finnegan* v. *Leu* to actions by a union which deprive a union member of employment, not by the union, but by employers in a bargaining unit. We do not believe that *Finnegan* v. *Leu* should be read this broadly. The term "otherwise disciplined" in Sections 101(a)(5) and 609 of the statute would seem to encompass a union member's removal from or demotion on an out-of-work list based upon a violation of a union rule or policy or the member's intra-union political activity. Indeed, it would be anomalous to conclude that the LMRDA prohibits a union from expelling a member from the union without due process or for expressing political opposition to a union's leadership, but not from excluding that member from a union hiring hall. In *Finnegan,* 456 U.S. at 435-436, this Court noted that the LMRDA "placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." If Congress was concerned about union discipline that could lead indirectly to "loss of livelihood," it is unlikely that it would have exempted union job referral systems from the Act, since discipline imposed through referrals affects livelihood directly.

To be sure, in *Finnegan,* this Court relied on the fact that in Section 609 the phrase "otherwise disciplined" follows three "punitive actions"—fine, suspension, and expulsion—which are "taken against union members as members." 456 U.S. at 437-438. To the extent that hiring hall referrals are available to non-union members, discrimination in such referrals may not neatly fit this description. Nevertheless, at a minimum, we believe that "discipline" for purposes of the LMRDA includes a sanction imposed by a union on a union member, through the

operation of a hiring hall or referral system, if the purpose of that sanction is to enforce union rules or policies, or to punish disfavored political positions.[10]

Moreover, even if discrimination in referrals did not constitute "discipline," retaliation for intra-union political activity taking that form should nevertheless be actionable

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[10] In *Miller* v. *Holden,* 535 F.2d 912, 914-915 (1976), the Fifth Circuit also applied the maxim of *ejusdem generis* to the phrase "fined, suspended, expelled, or otherwise disciplined" in Sections 101(a)(5) and 609 of the Act and concluded that an action affecting a member's employment could constitute "discipline" when (535 F.2d at 915):

> (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union, and (2) it directly penalizes him in a way which separates him from comparable members in good standing.

Commentators have differed on the extent to which union actions reducing a member's employment opportunities constitute discipline for purposes of the Act. Compare Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act,* 82 Harv. L. Rev. 727, 732-735 (1969) (such actions constitute discipline when "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union"), and Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?,* 9 Ga. L. Rev. 383, 392 (1975) ("The idea that 'discipline' includes only union action which affects membership status is unnecessarily narrow."), with Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference with Employment Opportunities,* 114 U. Pa. L. Rev. 700, 702 (1966) ("interference with employment opportunities should be excluded from the scope of section 101(a)(5)").

Concededly, not every action by a union adverse to a member can be characterized as "discipline." While the confines of "discipline" are not altogether clear, that term ordinarily refers to actions designed to enforce union rules, policies, or political viewpoints. The term derives some meaning, moreover, from the fact that "discipline" triggers a right to procedural due process under Section 101(a)(5). Presumably, an adverse action must be of a type that would make such procedures meaningful.

under Section 102 of the Act as an "infringement" of the member's protected rights of free speech and assembly. "[A] litigant may maintain an action under § 102—to redress an 'infringement' of 'rights secured' under Title I—without necessarily stating a violation of § 609." *Finnegan* v. *Leu*, 456 U.S. at 439. In *Sheet Metal Workers' Int'l Ass'n* v. *Lynn*, No. 86-1940 (Jan. 18, 1989), the Court framed the test for an action under Section 102 as follows (slip op. 7 (quoting *Finnegan* v. *Leu*, 456 U.S. at 441)):

> Whether such interference [with a right protected by Section 101(a)] gives rise to a cause of action under § 102 must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."

Under this test, discrimination in hiring hall referrals based upon protected intra-union political activity of the sort referred to in petitioner's complaint should be redressible under Section 102. Certainly, none of the considerations supporting this Court's determination in *Finnegan* v. *Leu*—that discharges from appointed policymaking positions in a union are exempt from the LMRDA—applies to such a case. See 456 U.S. at 441-442.[11]

[11] Indeed, in *Finnegan* v. *Leu*, 456 U.S. at 441 n.11, this Court reserved the question whether Section 102 would apply to discharges of "nonpolicymaking and nonconfidential employees." And in *Lynn*, *supra*, the Court held that elected union officials may not be discharged on the basis of their protected political activity. It would be anomalous if the Act prohibited discharges of these categories of employees from union positions, but did not apply to retaliatory refusals to place rank-and-file union members in positions with other employers.

Though not squarely inconsistent with holdings of the Sixth Circuit or other courts of appeals,[12] the decision in this case extends the reasoning of *Finnegan* v. *Leu* farther than any other decision has taken it. In *Murphy* v. *International Union of Operating Engineers, Local 18*, 774 F.2d 114 (1985), cert. denied, 475 U.S. 1017 (1986), a different panel of the Sixth Circuit held that a union's refusal to register a member's card in a union-operated job referral system, based upon the member's alleged theft of an election control list, was "discipline" for purposes of the LMRDA. Rejecting the claim that this action was "employment-related" and thus exempt from the LMRDA under the reasoning of *Finnegan* v. *Leu*, the court explained (*id.* at 123-124):

> The Union's action in foreclosing Murphy's participation in the work referral program was a sanction which set him apart from other members in good standing. It unquestionably affected his membership rights. Judge Lambros correctly held that the removal of the card was discipline impermissibly imposed without a full and fair hearing.

The court also held that, although the district court had ruled that discrimination in the referral system based upon a member's union political activity was not "discipline," that type of retaliation was directly actionable under Section 102 of the Act (*id.* at 122-123).

Two other courts of appeals have held that a union's suspension of a member from a job referral system because the member had violated the terms of a collective bargaining agreement did not constitute "discipline" for

[12] The rationale of the court of appeals' decision is, however, at odds with the reasoning of at least one pre-*Finnegan* decision in the Fifth Circuit. *Keene* v. *International Union of Operating Engineers, Local 624, AFL-CIO*, 569 F.2d at 1379-1380.

purposes of Section 101(a)(5) of the Act. *Turner* v. *Local Lodge No. 455 of the International Brotherhood of Boilermakers*, 755 F.2d 866 (11th Cir. 1985) (observing illegal picket line); *Hackenburg* v. *International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982) (wildcat strike). Both courts held that, under the reasoning of *Finnegan* v. *Leu*, the enforcement of a collective bargaining agreement did not affect a union member's rights or status as a member of the union and did not implicate the purposes of the LMRDA. 755 F.2d at 869-870; 694 F.2d at 1239. While there is language in both opinions suggesting that discrimination in a job referral system open to both union members and non-members cannot be considered "discipline" for purposes of the LMRDA, neither decision compels that result. In *Turner*, for instance, the court stated that, if the employee had alleged "retaliation for [the] exercise of a protected right, the case might be different." 755 F.2d at 870. See *Moore* v. *Electrical Workers Local 569*, 653 F. Supp. 767, 770 (S.D. Cal. 1987) ("It simply does not follow that a given action [discrimination in hiring from an out-of-work list] does not affect a member's rights or status simply because non-members may belong to the list."). Since petitioner has alleged that the Union retaliated against him because of his intra-union political activity and since any adverse action the Union has taken cannot be justified as a means of enforcing a collective bargaining agreement, *Turner* and *Hackenburg* do not support the court of appeals' decision in this case.

In conclusion, we do not believe that *Finnegan* v. *Leu* forecloses petitioner's claim that the union discriminated against him in job referrals in retaliation for his intra-union political activity. Even if retaliation of this type is not "discipline" for purposes of Section 609, it should remain actionable under Section 102 as an "infringement" of petitioner's rights under Section 101(a)(2) of the Act.[13]

---

[13] We note that the last question presented in the petition (Pet. i), which focuses on the issue of "discipline," may not encompass the issue whether the Union "infringed" petitioner's rights within the meaning of Section 102. But we believe that a fair reading of the complaint, with its invocation of Section 102 and the LMRDA bill of rights, does raise that issue, and we therefore suggest that, if the Court decides to grant plenary review, the issue is an appropriate one for consideration.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JANUARY 1989

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Supreme Court, U.S.
FILED
APR -7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-124

In The
Supreme Court of the United States
October Term, 1988

LYNN BREININGER,

Petitioner,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed July 20, 1988
Certiorari Granted February 21, 1989

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Not separately printed herein. See Appendix D, p. A12 to Petition for Writ of Certiorari to United States Court of Appeals for the Sixth Circuit filed July 20, 1988

UNITED STATES DISTRICT COURT DOCKET

0647 83 1126 12 13 83 3 790 1

Nearest $1,000/150 J 4714 M 88888 P 83 1126 Jury

PLAINTIFF
BREININGER, LYNN L.

DEFENDANTS
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION Local Union No. 6

CAUSE

(Cite the U.S. Civil Statute Under Which the Case is Filed and Write a Brief Statement of Cause)

29:151, 158 & 159(b)—Labor Mgmt. Relations Act

Unfair representation

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☐ Check Here If Case Was Filed in Forma Pauperis

FILING FEES PAID

Date	Receipt Number	C.D. Number
12-13-83	# Illegible	

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	Jan. 3, 1984
JS-6	Mar. 2, 1987

DATE	NR.	PROCEEDINGS
12/13/83	1	COMPLAINT with Jury Demand filed. SUMMONS issued to atty.
2/ 3/84	2	ANSWER filed. Mld.

DATE	NR.	PROCEEDINGS
4/ 3/84	4	1ST. AMENDED COMPLAINT with Jury Demand filed. Mld.
4/ 5/84	5	ANSWER to 1st Amended Complaint filed. Mld.
9/10/86	23	MOTION of deft. for summary judgment and/or strike jury demand filed. Mld. 58 pp.
11/19/86	24	DEPOSITION of Michael Duffey filed.
11/19/86	25	DEPOSITION of David Williams filed.
11/24/86	26	OPPOSITION of pltf. to motion filed 9/-0/86 with exhibits filed. Mld. VL (2 Volume)
11/26/86	27	AFFIDAVIT of Lynn L. Breininger (as exhibit "D" which pertains to opposition filed 11/24/86). 2 pp. VL
12/11/86	28	DEPOSITION of Lynn L. Breininger filed.
2/20/87	29	OPINION & ORDER filed. NJW. Deft. Union's motion summary judgment granted. Pltf.'s complaint dismissed. 8pp. DW
2/23/87	30	JUDGMENT filed. NJW. Deft. Union's motion for summary judgment granted. Pltf.'s complaint dismissed. Copies mld. 1 pg. DW
3/10/87	31	NOTICE OF APPEAL: of pltf. filed. Copies by clerk to: Landry, Julius, on 3/10/87. BP

GENERAL DOCKET

U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal from: OHN-Tol Record location: 14-11-E

Title of Case

Lynn L. Breininger,

Plaintiff-Appellant,

vs.

Sheet Metal Workers International Association, Local Union No. 6,

Defendant-Appellee.

See Page 3 for any additional title

( ) Crim ( ) Rule 35 ( ) M.V. 2255
( ) H.C. 2254 ( ) H.C. 2241 ( ) Grand Jury
( ) C.R. Otr. ( ) Civ. Otr. (X) Fed. Ques.
( ) Div. ( ) S.S. ( ) C.R. Pris. ( ) C.R. School
( ) C.R. Title VII ( ) Civ. U.S. ( ) Agcy.
( ) Tx. Ct. ( ) Bk. ( ) Mand-Pris.
( ) Mand-Otr. ( ) 1292(b) ( ) Otr.

Fee (X) Paid ( ) IFP ( ) CJA ( ) GOV.

District Court Data

Dist. Docket No. C 83-1126

Dist. Judge—N. Walinski

Date of Judgment: 02-23-87 Date NOA filed: 03-10-87

Case No. 87 3224

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( ) Consolidated ( ) Related ( ) Prior

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Short Title

Breininger v. Sheet Metal Workers

Additional title, counsel, or comments about page 2:

Case No. 87-3224

Date		FILINGS-PROCEEDINGS
1987		
03/13	01)	NOTICE OF APPEAL, filed ns
03/13	02)	LETTER—case opening [forms due 03/27] ns
03/23	03)	APPEARANCE Of J. Julius for appellees jmb
03/25		*CERTIFIED RECORD*, filed (02 plea; 03 dep) [NB] ns

Date		FILINGS-PROCEEDINGS
03/26	04)	APPEARANCE of F. J. Landry for appellant jmb
03/26	05)	PRE-ARGUMENT STATEMENT from appellant jmb
03/26	06)	TRANSCRIPT ORDER from appellant, trans. unnecessary jmb
04/03	07)	LETTER—briefing (5/18; 6/22; 7/9; 7/16) ns
05/18		BRIEF/APPELLANT (10) (m-5/15) pje
06/05	08)	MOTION/APPELLEE ext to 7/6 to file brief (m-6/4) pje
06/08	09)	LTR: RULING/GRANTING ext to 7/6; repl to 7/20; ja due 7/27 (JPH/bb) pje
07/06		BRIEF/APPELLEE (10) (m-7/3) pje
07/20		REPLY BRIEF/APPELLANT (10) (m-7/17) pje
07/27		JOINT APPENDIX (5) (m-7/24) bb
11/20	10)	LETTER: to counsel; oral argument sched. for 1/11/88. jmb
1988		
01/11		CAUSE argued by Landry for appellant, by Roca for appellee and case submitted to the Court (Before: Engel, Kennedy and Krupansky, JJ.) gm
01/11	11)	APPEARANCE of J.M. Roca for appellee jmb
03/01	12)	JUDGMENT: affirmed by per curiam opinion (Engel, Kennedy and Krupansky, JJ.) (Published) gm
03/15	13)	PETITION FOR REHEARING by appellant (m-3/14) mdm

04/22 14) ORDER: petition for rehearing (#13) denied (Engel, Kennedy, and Krupansky, JJ.) gm

05/02 15) MANDATE issued (No costs taxed) gm

05/23 16) MOTION/NON-PARTY (IBEW): for publication of Court's decision herein on 3/1/88 (m-5/20/88) gm

05/31 17) JOINER IN MOTION: publications of Court's 3/1/88 decision (m-5/27/88) gm

06/09 18) MOTION/APPELLEE: for publication of Court's 3/01/88 decision with memo in support (m-6/8/88) gm

06/15 19) ORDER: motion for publication of Court's 3/1/88 decision (#18) granted (Krupansky, J.) gm

07/28 20) NOTICE of filing petition for certiorari (S. Ct. No. 88-124) 7/20/88 gm

1989

02/23 21) CERTIFIED copy of S. Ct. order granting certiorari 2/21/89 gm

02/23 Copy of #21 sent to D. Ct. gm

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Lynn L. Breininger Plaintiff	)	Case No. C83-1126
v.	)	Hon. Nicholas J. Walinski
Sheet Metal Workers International Association Local Union No. 6 Defendant	)	FIRST AMENDED ANSWER

Now comes the defendant Sheet Metal Workers International Association, Local Union No. 6 (hereinafter referred to as the "Union") by and through its attorneys, the law office of Gallon, Kalniz & Iorio Co., L.P.A., and for its answer to the plaintiff's First Amended Complaint, numbering each paragraph of this answer to correspond to the paragraph of plaintiff's First Amended Complaint to which it is responsive, does state and aver as follows:

1. That defendant Union admits that plaintiff has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1331, § 1337, and § 1343(4); 28 U.S.C. § 2201 and § 2202; and, 29 U.S.C. § 151, § 158(b), and § 159; but, denies that jurisdiction is so properly invoked. Further, the defendant Union denies the remaining allegations of paragraph 1 of the plaintiff's First Amended Complaint.

2. That defendant Union admits that plaintiff has attempted to invoke the jurisdiction of this Court pursuant to 29 U.S.C. § 411, § 412, and § 529; but, denies that jurisdiction is so properly invoked. Further, the defendant

Union denies the remaining allegations of paragraph 2 of plaintiff's First Amended Complaint.

3. That defendant Union admits that plaintiff is a white male citizen of the United States and a resident of the City of Petersburg in the State of Michigan; and the plaintiff is and has been a member in good standing of defendant Union. Further, the defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff has been a member in good standing of defendant Union for approximately thirty-four (34) years up to the present time and of the collective bargaining unit described in paragraph 3, *infra*. Further, defendant Union denies the remaining allegations contained in paragraph 3 of the plaintiff's First Amended Complaint.

4. That defendant Union admits allegations contained in paragraph 4 of the plaintiff's First Amended Complaint.

5. That defendant Union admits that at all material times the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association and the defendant Union have been signatory to collective bargaining agreements. Likewise, the defendant Union admits that the collective bargaining agreement cited by plaintiff speaks for itself at Article V. Finally, the defendant Union denies the remaining allegations contained in paragraph 5 of the plaintiff's First Amended Complaint.

6. That defendant Union denies the allegations contained in paragraph 6 of the plaintiff's First Amended Complaint.

7. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff was laid off in November, 1982. Further, the defendant Union admits plaintiff's presence at the Enrico Power Unit Job No. 2657 was requested by Venderbush Industrial Corporation. Likewise, the defendant Union admits plaintiff was not referred to employment at the Enrico power Unit Job No. 2657 in a lawful, nondiscriminatory manner. Further, defendant Union denies remaining allegations contained in paragraph 7 of the plaintiff's First Amended Complaint.

8. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the plaintiff's First Amended Complaint.

9. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the plaintiff's First Amended Complaint.

10. That defendant Union denies the allegations contained in paragraph 10 of the plaintiff's First Amended Complaint.

11. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the plaintiff's First Amended Complaint.

12. That defendant Union admits that plaintiff filed a charge under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Worker's International Association. Further, defendant Union denies the remaining alle-

gations contained in paragraph 12 of the plaintiff's First Amended Complaint.

13. That defendant Union denies the allegations contained in paragraph 13 of the plaintiff's First Amended Complaint.

14. That defendant Union realleges paragraphs 1-13 of this Answer as if fully rewritten herein.

15. That defendant Union admits that it conducted an election for officers in June, 1982. Further, defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegation that, "... in said election, plaintiff participated by handing out pencils advertising the former business manager, Don Reaume, and the former business agent, Bob Good". Finally, defendant Union denies remaining allegations contained in paragraph 15 of the plaintiff's First Amended Complaint.

16. That defendant Union denies the allegations contained in paragraph 16 of the plaintiff's First Amended Complaint.

17. That defendant Union denies the allegations contained in paragraph 17 of the plaintiff's First Amended Complaint.

18. That defendant Union denies the allegations contained in paragraph 18 of the plaintiff's First Amended Complaint.

19. That defendant Union denies the allegations contained in paragraph 19 of the plaintiff's First Amended Complaint.

20. That defendant Union denies each and every allegation of the plaintiff's First Amended Complaint not hereintobefore specifically admitted to be tru; and, further answering by way of partial or complete affirmative defense, do state and aver as follows:

FIRST AFFIRMATIVE DEFENSE

21. That the plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

22. That defendant Union realleges paragraph 1 through 21 of this Answer as if fully rewritten herein.

23. That this court lacks the requisite jurisdiction over the subject matter of plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

THIRD AFFIRMATIVE DEFENSE

24. That defendant Union realleges paragraph 1 through 23 of this Answer as if fully rewritten herein.

25. That plaintiff's First Amended Complaint was not filed within the requisite statute of limitations period.

FOURTH AFFIRMATIVE DEFENSE

26. That defendant Union realleges paragraph 1 through 25 of this Answer as if fully rewritten herein.

27. That plaintiff failed to exhaust contractual and/or internal union remedies.

FIFTH AFFIRMATIVE DEFENSE

28. That defendant Union realleges paragraph 1 through 27 of this Answer as if fully rewritten herein.

29. That defendant's actions or omissions do not constitute arbitrary, discriminatory or bad faith conduct.

SIXTH AFFIRMATIVE DEFENSE

30. That defendant Union realleges paragraph 1 through 29 of this Answer as if fully rewritten herein.

31. That defendant Union's actions or omissions were not a breach of the duty of fair representation under the provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185.

SEVENTH AFFIRMATIVE DEFENSE

32. That defendant Union realleges paragraph 1 through 31 of this Answer as if fully rewritten herein.

33. That the allegations of plaintiff's First Amended Complaint are preempted by the provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 151 at *et. seq.*

WHEREFORE, the defendant Union demands judgment as follows:

A. that this Court dismiss the plaintiff's First Amended Complaint and order that the plaintiff take nothing.

B. that this Court grant the defendant Union the costs of this action, including reasonable attorney's fees.

C. that this Court grant defendant Union any and all other relief to which it deems the defendant entitled.

Respectfully submitted
GALLON, KALNIZ & IORIO, Co., L.P.A.
By Jeffrey Julius

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing First Amended Answer was mailed this — day of April, 1984 to Francis J. Landry, attorney for plaintiff, 300 Inns of Court Building, 405 N. Huron St., Toledo, OH 43604.

United States District Court
for the Northern District of Ohio
Western Division

Deposition of Lynn Breininger
R.28 Dated June 13, 1984

• • •

(p. 27) A. Yes.

Q. And how did you become familiar with that?

A. Well, through Union meetings and discussing it and letters and such.

Q. Could you explain your understanding of the way a Union member or Union members can get a job working for sheet metal contractors under the jurisdiction of Local 6?

A. Well, you can get it through the Union Hall, your own work.

Q. Through the Union?

A. You can get it through the Union Hall. You also can go out and solicit your own work.

Q. And when you talk about going through the Union, is that using the referral procedure that the Union provides?

A. Well, I would say so, yes. It's not necessarily always that way, though.

Q. That's your claim; correct?

A. Right.

Q. Before we talk about your claims specifically, it's my understanding that the Union maintains what's known as an out-of-work list?

• • •

(p. 85) I was not sent. She was pretty quick on the answer. She said that it was a contract dispute and that

they didn't handle that. I told her at the time that I had a lawyer, and she said, in other words, tell him. I mean not tell him, that he would know this, that if there is any question, that I should just ask him, that he would automatically know this, and that was it.

Q. Was that your first and only contact then with the Labor Board?

A. Right.

Q. In going back then after receiving what has been marked as Defendant's Exhibit 7a, and that's the July 21, 1983 letter from the International, did you have any contact with any representative of the International?

A. No.

Q. Did you talk to Malcolm Hamilton?

A. I talked to Malcolm Hamilton after this letter.

Q. Do you recall the date you talked to him on?

A. No, but I think I have that at home. I think I seen that at home. I met him at the Holiday Inn out on Reynolds Road.

• • •

(p. 145) Q. The Bechtel job was Fermi; correct?

A. Right.

Q. When did that job run, begin, and has it ended?

A. It hasn't ended yet. It was going, I believe, '80 or '81. It will show you on that one list. I seen a date there of out-of-work list of '81 or '80.

Q. I think that's marked B 11 is how it was marked.

A. 11/23/81, that was one there. Here's from 9/22/80 the job started on one of them there. It may have started earlier than that even.

Q. You are alleging there have been times when the list has been jumped with respect to the Bechtel project also; correct?

A. Right.

Q. Do you have specific individuals that you know about that you're alleging jumped the list?

A. Right here, if you want to go through it. It spells it out, when they were hired and when they were terminated. This fellow, for instance, has worked there five times.

Q. And do you know whether he's been recalled by name?

A. Do they have any referrals?

(p. 146) Q. Well, I'm asking you whether you know.

A. He has to be called by a name to get back there.

Q. Have you worked on the Bechtel project at all?

A. No.

Q. Do you know whether the Union has negotiated a provision that requires Bechtel to recall people in the order that they laid them off?

A. I don't believe so, because the way they have it for hiring is a letter of request which they got in to our

Union before they took power, and everybody else that goes to a job has to have a letter of request. When you worked for somebody and you're laid off, in order to go back again, you should have a letter of request. There's no letters of request in their records.

Q. Now, are there any individuals right now that you can name that you feel have jumped the list at Bechtel?

A. Oh, yes, if I can look over this slip here.

Q. Please do.

A. Well, we'll do it together.

Q. You have pointed to an individual on B 11; is that correct?

• • •

(p. 152) Q. Blakeman, B-l-a-k-e-m-a-n maybe. He is the one right in the middle with a hundred and sixteen by his name?

A. Right.

Q. And you're claiming him also; correct?

A. I would think so the way the dates are, and Edward Palmer and Randy Lindhorst.

Q. L-i-n-d-h-o-r-s-t, I think.

A. Dave Allen. No. He hired one day and got laid off the next day, apparently. We can't count him. He didn't get ten consecutive days. That's confusing here. Charles Fisher.

Q. You have named the majority of the people on Defendant's Exhibit B 11; is that correct?

A. Pardon?

Q. You've named a majority of the people on Defendant's Exhibit B 11?

A. Right.

Q. Is it your claim that all of those persons are members of this "Concerned Brothers" and that's why they're referred before you?

A. Not all of those people are. A majority of them are.

• • •

(p. 154) A. Right. The other group on the other side isn't working.

Q. So you're saying that there are two groups within the Union?

A. Correct.

Q. And you can name who's on one side and who's on the other side?

A. Well, I can't name each and every one of them, but it is very obvious if you could attend a meeting.

Q. And you feel that anybody that supports the administration or who makes a showing supporting that administration is treated differently?

A. I would say, yes.

Q. And that's based upon what?

A. Well, who is working and who isn't working.

Q. And have you ever been told by anybody that if you would support the administration, you'd work more?

A. No, because they knew my opinion of them before they went into office.

Q. Your opinion about what?

A. Well, way of doing business, way of running a Union Hall.

• • •

(p. 159) A. The fact itself is the copy of the letter and they never called me to go to the job. I was there the 10th and asked why I wasn't sent. The business agent blamed it on the business manager. Four days or three days after that, the business manager blamed it on the business agent. So, I mean, they said they called and Venderbush said it was perfectly all right, they could send somebody else, and it's not so.

Q. And the people that were sent to the job rather than you, and that's the Venderbush job, do you know who they were?

A. It was Joseph Nunley.

Q. And is Joe Nunley a member of the "Concerned Brothers"?

A. Yes, I would say so.

Q. Do you know for sure?

A. Yes.

Q. And how do you know that?

A. Well, he just proposed to have a professional hiring hall, in other words, for our Local instead of the present system that we have.

Q. A professional or an exclusive?

A. Well, he named it professional. There was nothing

• • •

(p. 181) an election of business manager and business agent. In said election, Plaintiff participated by handing out pencils advertising the former business manager, Don Reaume, and the former business agent, Bob Good; see that?

A. Yes.

Q. On how many occasions did you hand out pencils for Don Reaume and Bob Good,

A. Well, I had a bunch of them. I don't know how many occasions it would be, but during election time it was probably the main time.

Q. Who did you hand them out to?

A. Anybody that took one.

Q. Would you go to different job sites and hand them out?

A. Oh, no, no. That didn't happen, no.

Q. How would you go about handing it out? I guess I'm confused.

A. Well, when they have an election, right there is the door; simple as that.

Q. You're saying on the date of the actual balloting?

A. Right.

Q. You stood outside the Union Hall?

(p. 182). A. Right, or wherever you was around or wherever you were at and a Union member is there, have one in your pocket and you give it to him.

Q. And did you specifically hand it out outside the Union Hall on election day? I'm talking about you personally.

A. You mean handed out pencils other than at that—I just said say there'd be somewhere where I would run across somebody, give it to him.

Q. In other words, when you'd run into a Union member whether on a job site or someplace else, you'd give them one of these pencils?

A. Right.

Q. Did you personally stand outside the Union Hall on election day, and I'm talking about the election of the officers, and hand out pencils?

A. Right.

Q. You did?

A. Yes. In fact, they went pretty fast.

Q. And on that day, did you see Dave Williams or Mike Duffey?

A. I didn't see Dave Williams, but I seen Mike Duffey.

Q. Did you have a conversation with him?

• • •

———

Exhibit B-11 to Deposition of Lynn Breininger

AFTER DUFFEY (illegible) 1982

BECHTEL			HIRED	TERMINATED
SM-01	Wilbur Scheich		9-22-80	3- 3-83
		x	3-14-83	6-21-83
		x	6-29-83	8-19-83
07	Craig Ranik		10- 1-81	1-21-83
		x	4- 8-83	10-14-83
11	Allen Hoover		11- 2-81	4-13-82
			11-22-82	3- 3-83
		x	3-14-83	6-10-83
		(illegible)		
		(illegible)		
18	Michael Myers		11-16-81	9- 8-82
			10- 5-82	Still working
19	Jerry Brown		11-16-81	4-13-82
			10- 5-82	3- 3-83
		x	3-14-83	3-29-83
		x	5- 2-83	6-21-83
		x	6-30-83	9-28-83
23	Oscar Manquis		11-23-81	3-12-82
		x	4- 4-83	6-10-83
		x	7- 8-83	9-28-83
24	Elwood Shannon		11-23-81	9- 8-82
			10- 5-82	Still working
25	Ralph Thornton		11-30-81	12- 1-81
			1-25-82	4-13-82
			10-11-82	1-20-83
		x	4- 8-83	9-25-83
32	Donald Turner		1-11-82	1-21-83
		x	3-14-83	Still working
35	Richard Wilder		1-11-82	4-13-82
			10-12-82	6-22-83
		x	6-30-83	Still working
42	Richard Buck		1-25-82	4-13-82
		x	1-10-83	3- 3-83
		x	3-14-83	6-21-83

BECHTEL			HIRED	TERMINATED
43	Jerry Cravens		1-28-82	1-29-82
			1-10-83	2-10-83
		x	4-11-83	10- 7-83
52	Clarence Mead		2-15-82	3- 3-83
		x	3-18-83	9-28-83
77	Arvid Steiff		2-15-82	3-12-82
			11-22-82	5-13-83
		x	6-30-83	11- 4-83
89	John Pendeau		11-22-82	6-15-83
		x	6-29-83	8- 5-83
91	Carl Steward		11-22-82	3- 3-83
		x	3-14-83	6-22-83
		x	6-30-83	10- 7-83
97	Gary Stanford		1-10-83	3- 3-83
		x	3-18-83	9-28-83
99	Robert Kuhn		1-10-83	6-15-83
		x	6-29-83	12- 9-83
102	Clayton Hoffman		1-10-83	6-21-83
		x	6-29-83	Still working
116	Donald Blakeman		4- 4-83	6-15-83
		x	6-29-83	11- 4-83
118	Edward Palmer		4- 4-83	6-15-83
		x	6-29-83	9-28-83
119	Randy Lindhorst		4- 4-83	6-21-82
		x	6-29-83	11- 4-83
122	Daniel Allen		4-4-83	4- 5-83
		x	4- 8-83	4-22-83
		x	4-29-83	9-28-83
128	Charles Fisher		4- 4-83	6-22-83
		x	6-29-83	10-14-83

Exhibit C to Deposition of Lynn Breininger,
Pages 1, 2, 3, 4, 10, 11

ARTICLE OF AGREEMENT

Between

TOLEDO AREA SHEET METAL AND ROOFING
CONTRACTORS ASSOCIATION
TOLEDO HEATING AND AIR CONDITIONING
CONTRACTORS ASSOCIATION

And

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6
TOLEDO, OHIO

THIS CONTRACT HAS BEEN AMENDED AND EXTENDED THROUGH JUNE 30, 1984 IN ACCORDANCE WITH THE ATTACHED MEMORANDUM OF AGREEMENT.

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AGREEMENT BETWEEN

TOLEDO AREA SHEET METAL AND ROOFING CONTRACTORS ASSOCIATION, TOLEDO HEATING AND AIR CONDITIONING CONTRACTORS ASSOCIATION,

and

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6

AGREEMENT

(1) The following articles are the total accumulation of the sections of the Standard Form of Agreement and Addenda agreed to between Management and Labor on July 1, 1980.

(2) AGREEMENT, entered into this 1st day of July, 1980, by and between the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association hereinafter referred to as the Employer, and Local Union No. 6 of the Sheet Metal Workers Inter-

national Association, hereinafter referred to as the Union for Toledo, Ohio, and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan.

Whenever in this agreement "man" or "him" or their related pronouns may appear, either as words or parts of words, they have been used for representative purposes and are meant to include both female and male sexes.

COLLECTIVE BARGAINING UNIT

Section 1. The persons, firms, corporations, joint ventures, or other business entities bound by the terms of the Agreement are referred to in this Agreement as "Employer" or "Employers." The Employers and the Union by entering into this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement.

Section 2. Employers covered by this Agreement shall be free to designate their own representatives for the purpose of collective bargaining and contract administration; however, such designation shall not affect the Employer's membership in the collective bargaining unit established by this Agreement.

ARTICLE I

WORK JURISDICTION

(3) This Agreement covers the rates of pay, rules and working conditions of all employees of the employer engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof

and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment, all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; (e) all other work included in the jurisdictional claims of Sheet Metal Workers International Association; and (f) custom fabrication of non-building trade items are excluded from the term of this contract.

ARTICLE II

UNION SHOP

(4) Subject to other applicable provisions of this Agreement, the Employer agrees that when subcontracting for prefabrication of materials covered herein, such prefabrication shall be subcontracted to fabricators who pay their employees engaged in such fabrication not less than the prevailing wage for comparable sheet metal fabrication, as established under provisions of this Agreement.

(5) The Employer agrees that no Employee shall be discharged for refusing to work with other employees on construction who are not affiliated with a recognized Building Trades Craft Union.

(6) A Sheet Metal Shop or Sheet Metal business shall not be considered a union sheet metal shop or union sheet metal business unless the owners sign and remain parties to this Agreement, or an Agreement with the local union or these Associations in whose jurisdiction such shop or business is located. No sheet metal shop or sheet metal business shall be recognized as union or entitled to the privileges or use of the shop card or label unless it permanently employs one or more journeymen sheet metal workers in good

standing and with full membership in the Sheet Metal Workers International Association on all work covered by Article I of this Agreement, and permits not more than one (1) stockholder, owner, partner, or other person directly or indirectly financially interested in the management of such shop or business to work with the tools of the trade and then in the shop only.

ARTICLE III

SUBCONTRACTING

(7) The Contractor agrees that we will not subcontract job site work which is to be performed at a time when employees of the Contractor are working at such site under the terms of this Agreement to any employer which does not have at the time the work is to be performed, a collective bargaining relationship with a Building Trades union covering such work, whose members receive the prevailing wage rates.

(8) The Employer agrees that any portion of the work covered by this contract to be done at the job site shall be done either by his own forces in accordance with the terms of this agreement or by subcontractors who have signed agreements with Local Union No. 6

ARTICLE IV

EMPLOYER AGREEMENT

(9) The Employer agrees that none but journeymen and apprentice sheet metal workers shall be employed (except as provided in training plan) on any work described in Article I.

(10) If the Union furnishes employees to any employer/s within the jourisdiction of this agreement and allows said employer/s more favorable wages, terms or conditions, the Union agrees that the same more favorable wages, terms, or conditions shall automatically be extended to all employers covered by this agreement.

ARTICLE V

FURNISHING OF WORKERS; NON-DISCRIMINATION

(11) The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. Employers agree to confirm, in writing, to Local No. 6 when requesting Employees. Tht Union agrees not to delay the referral of employees because of delays in mailing the request.

(12) The Employer may hire sufficient men to man his work if the Union cannot furnish same within a period of forty-eight (48) hours after their request.

(13) Whenever an Employer reduces his work forces, he shall do so on a priority basis to protect the local geographical area of skilled journeymen.

(14) The Employer agrees in the employment of men and the Union agrees in the referral of men and/or the selection of apprentices that there will be no discrimination because of race, color, religion, sex, handicap, or national origin in accordance with city, state or federal law.

(15) It is further agreed that the Joint Conference Board of the Toledo Building Congress shall act as a local hearing board for any charges of discrimination against any Employer, employer association, apprenticeship committee, union or individual on any complaint of discrimination, and that such board shall act as promptly as possible.

ARTICLE VI

UNION SECURITY

(16) The Employer agrees to require membership in the Union, as a condition of continued employment of

all employees performing any of the work specified in Article I of this Agreement, after eight (8) days following the beginning of such employment or the effective date of this Agreement, whichever is the later, provided the Employer has reasonable ground for believing that membership is available to such employees on the same terms and conditions generally applicable to other members and that membership is not denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership.

(17) If, during the term of this Agreement the Labor-Management Relations Act of 1947 shall be amended by Congress in such manner as to reduce the time within which an employee may be required to acquire union membership, such reduced time limit shall become immediately effective instead of and without regard to the time limit specified in Paragraph 16 of this Article.

(18) The provisions of this Article shall be deemed to be of no force and effect in any state, to the extent to which the making or enforcement of such provision is contrary to law. In any state where the making and enforcement of such provision is lawful only after compliance with certain conditions precedent, this Article shall be deemed to take effect as to involved employees immediately upon compliance with such conditions.

ARTICLE VII

WORKING HOURS; OVERTIME; HOLIDAYS; SHIFT OR NIGHT WORK; ETC.

(19) The regular working day shall consist of eight (8) hours labor in the shop or on the job between seven (7) a.m. and four-thirty (4:30) p.m. and regular working week shall consist of five (5) consecutive eight (8) hour days labor in the shop or on the job, beginning

with Monday and ending with Friday of each week. All full time or part time labor performed during such hours shall be recognized as regular working hours and paid for at the regular hourly rate. Except as otherwise provided pursuant to Paragraph 26 of this Article, all work performed outside the regular working hours and performed during the regular work week, shall be at double time and regular hourly rate.

(20) The Employer, without penalty, may schedule an eight hour work day between the hours of 7 o'clock a.m. and 5 o'clock p.m., provided he gives notice of same to the Northwestern Ohio Building and Construction Trades Council before the close of business on the previous business day.

(21) Rules of the Building Trades Council of working hours will be followed on all construction sites.

(22) Employees shall be allowed coffee or other non-alcoholic beverage twice during working hours (morning and afternoon) at their immediate respective work station with a maximum total of ten minutes for each break.

When an Employee is requested to work in excess of nine (9) hours, there shall be an additional coffee break at the eight (8th) hour and every (4) hours thereafter.

When an Employee is requested to work in excess of ten (10) hours a day in which overtime has not been scheduled, the Employee shall receive a thirty (30) minute lunch period after the tenth (10th) hour, paid by the Employer at the appropriate rate. In the case of scheduled overtime, the Employee shall receive a thirty (30) minute lunch break after the tenth (10th) hour and every fourth (4th) hour thereafter, for which he will not be paid.

Scheduled overtime must be scheduled by the end of the previous day's regular shift.

(23) Employees shall be at the shop or project site at scheduled starting time each day and shall remain until quitting time.

(24) New Year's Day, Decoration Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day or days locally observed as such shall be recognized as holidays. All work performed on holidays, Saturday, and Sunday shall be paid at double the regular hourly rate, except as provided for in three shift operations.

(25) It is agreed that all work performed outside of regular working hours during the regular work week and on holidays shall be performed only upon notification by the Employer to the local union in advance of scheduling such work. Preference to overtime and holiday work shall be given to men on the job on a rotation basis so as to equalize such work as nearly as possible.

(26) SHIFT OR NIGHT WORK—When two-shift or night work operations are performed, base rate plus 15% shall be poid. (sic) Shift or night work of more than (8) hours per day shall be paid at overtime rate.

(a) If an Employee who has worked continuously from the start of his scheduled shift and is directed to report for work at the start of his regular shift the following day without six (6) hours elapsed in between shifts, he shall receive the applicable overtime rate. If the Employee requests to work on a different job site and location without a six (6) hour elapsed time between shifts and the Employer agrees, he shall receive the normal rate.

(b) No workman shall suffer a loss of working time as a result of shift or night work that would reduce his working time below 40 hours for the week.

(c) No work can be considered as shift or night work unless at least a minimum of three days

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change its Savings/Vacation Plan deduction or Dues deduction, the changes shall become effective upon the date requested by the Union, providing the Employer is given a 60 day notice.

TACW FUNDING

If the Toledo Area Construction Workers' Health and Welfare Fund falls below predetermined safe financial level of operation, then the contribution rate shall be increased by the amount determined to be needed by the Trustees, or benefits would be reduced to protect the safe financial level.

ARTICLE XI

CONTRACTORS ADMINISTRATIVE FUND

(68) Each employer shall pay $.10 for each hour paid to each employee of the Employer within the bargaining unit. Such payments by check shall be made payable to the Toledo Area Construction Workers Health and Welfare Fund Trustees as depository and shall be transmitted to the Contractors Administrative Fund, 1806 Madison Avenue, Toledo, Ohio 43624, no later than the 15th day of the month following the calendar month in which the work was performed. Reporting forms shall be furnished by the Trustees of the Contractors Administrative Fund to the Employers and the form shall provide that the ten cents ($.10) an hour be made by a separate check payable to the Toledo Area Construction Workers Health and Welfare Fund Trustees as depository. Delinquent contributions shall be subject to such Penalties or assessments as the Trustees of the Fund may prescribe from time to time.

In no event shall the foregoing provisions of this Section be subject to or suitable for grievance and arbitration under this Agreement.

The Trustees of said Fund shall comply with all present and future Federal laws governing the same.

The Union shall have no participation or control of any kind or degree whatever nor shall the Union be connected in any way with the Contractors Administrative Fund.

The Employer Association party to this Agreement agrees to defend, indemnify and hold harmless the Union from any and all claims made against it arising out of the establishment and existence of the Fund.

Effective July 1, 1981, the Contractors Administrative Fund may be increased $.01/hour at the option of the Northwestern Ohio Council of Construction Employers.

ARTICLE XII

TOOL REQUIREMENTS

(69) Journeyman shall furnish the following tools:

One six foot rule (folding)
Straight snips
Rivet sets (as required)
Combination square with level (12″)
Crescent or open end wrench
Pliers and tongs
Prick punch, cold chisel
Dolly bar
Two pair aviation snips (right & left)
Screw Drivers (as required)
Hack saw frame
Dividers (as required)
Hammers (tinners)
Scratch awl, center punch
Drift pin

Journeymen will not be permitted to furnish any power tools.

(70) All special tools and equipment such as drill motors, step ladders, levels, C. clamps, extension cords, 16″ x 24″ square, circumference rules, drawing tools, and board, mallets, whitney punches, machine punches, saw blades, saws, drills, files, solder irons, firepots, welding hood and other protective equipment as required for welding, pop rivet guns and socket sets shall be furnished by the Employer.

(71) SAFETY EQUIPMENT

The Employer shall furnish hardhats, new hardhat webbing and liners, eye protection, face shields, respirators and mask, helmets and hods, gloves aprons, and sleeves and other protective equipment as required for burning, welding, working with acid, etc.

(72) The Employer shall furnish protection for the Employee's hand tools and the Employer's own possessions on all jobs where needed by proper gang boxes and padlocks. The Employer will be responsible for loss from the gang box by fire or theft. Proof of loss will be required.

(73) Employees covered by this Agreement shall not be permitted or required as a condition of employment to furnish the use of an automobile or other conveyance to transport men, tools, equipment or materials from shop to job, from job to job, or from job to shop; facilities for such transportation to be provided by the Employer. This provision shall not restrict the use of an automobile or other conveyance to transport its owner and personal tools from home to shop or job at starting time or from job to home at quitting time.

ARTICLE XIII

GRIEVANCE AND ARBITRATION

(74) Grievance of the Employer or the Union arising out of interpretation or enforcement of this Agree-

ment, shall be settled between the Employer directly involved and the duly authorized representative of the Union, if possible. An Employer may have the local Association present to act as his representative.

(75) Grievances not settled as provided in Paragraph 74 of this Article may be appealed by either party to the Local Joint Adjustment Board in the area in which the work is performed and such Board shall meet promptly on a date mutually agreeable to the members of the Board, but in no case more than fourteen (14) calendar days following the request for its services, unless the time is extended by mutual agreement of the parties, to render a final and binding determination, except as provided in Paragraphs 77 and 80 of this Article. The Board shall consist of an equal number of representatives of the Union and of the local Employers' Association and both sides shall cast an equal number of votes at each meeting. The local Employers' Association, on its own initiative, may submit grievances for determination by the Board as provided in this Paragraph.

(76) Notice of appeal to the Local Joint Adjustment Board shall be given within thirty (30) days after termination of the procedures prescribed in Paragraph 74 of this Article, unless the time is extended by a mutual agreement of the parties.

(77) Grievances not disposed of under the procedure prescribed in Paragraph 75 of this Article, because of a deadlock, or failure of such Board to act, may be appealed jointly or by either party to a Panel consisting of one (1) representative appointed by the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. Appeals on behalf of employees shall be mailed to the General Secretary-Treasurer of the Sheet Metal Workers International Association and those on behalf of an employer mailed to the Secretary of the Labor Committee of the Sheet Metal and

Air Conditioning Contractors' National Association, Inc. Joint appeals shall be mailed to the Secretaries of both Associations. Notice of appeal to the Panel shall be given within thirty (30) days after termination of the procedures prescribed in Paragraph 75 of this Article. Such Panel shall meet promptly, but in no event more than fourteen (14) calendar days following receipt of such appeal, unless such time is extended by mutual agreement of the Panel members. Except in case of deadlock, the decision of the Panel shall be final and binding.

(78) Notwithstanding the provisions of Paragraph 77 a contractor who was not a party to the labor agreement of the area in which the work in dispute is performed may appeal the decision of the Local Joint Adjustment Board, including a unanimous decision, and request a Panel hearing as set forth in Paragraph 77 of this Article, providing such appeal is approved by both the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. and by the General President of Sheet Metal Workers International Association.

(79) Grievances not settled as provided in Paragraph 77 of this article may be appealed jointly or by either party to the National Joint Adjustment Board, as established by the Sheet Metal Workers' International Association and the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submission shall be made and decisions rendered under such procedures as may be prescribed by such Board, from time to time, and mutually approved by the parties creating it. Copies of the procedures shall be available from, and submissions of grievances may be made to, either the General Secretary-Treasurer of Sheet Metal Workers' International Association or the Secretary of the Labor Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submissions on appeal to the National Joint Ad-

justment Board shall be made within thirty (30) days after termination of the procedures prescribed in Paragraph 77 of this Article.

(80) A Local Joint Adjustment Board, Panel and the National Joint Adjustment Board are empowered to render such decisions and grant such relief to either party as they deem necessary and proper, including awards of damages or other compensation and, if it is believed warranted, to direct that the involved agreement and any other agreement or agreements between the employer and any othr local union affiliated with the Sheet Metal Workers' International Association be cancelled, provided that any decision of a Local Joint Adjustment Board directing cancellation of an agreement or agreements may be appealed by the affected employer or local union as a matter of right, directly to the National Joint Adjustment Board.

(81) In the event any party fails or refuses to comply with any decision of a Local Joint Adjustment Board or Panel without appeal, or any decision of the National Joint Adjustment Board, within thirty (30) days after notice thereof, a Local Joint Adjustment Board, Panel, or any party to the dispute may, in addition to any other legal remedies which may be available to the parties, request the National Joint Adjustment Board to cancel the involved agreement and any other agreements between the involved employer and other local unions affiliated with Sheet Metal Workers' International Association. Unless otherwise decided by unanimous vote, the National Joint Adjustment Board shall cancel such agreements if it finds the involved party to be in non-compliance with the decision in question. Requests for the Board's services shall be made in the same manner and in the same form as other appeals to the National Joint Adjustment Board and the procedure followed shall be the same except that any intermediate step or steps shall be omitted and the request made directly to the National Joint Adjustment Board.

(82) Failure to exercise the right of appeal at any step thereof within the time limit provided therefore shall void any right of appeal applicable to the facts and remedies of the grievance involved. There shall be no cessation of work by strike or lockout during the pendency of the procedures provided for in this Article. Except in case of deadlock, the decision of the National Joint Adjustment Board shall be final and binding.

(83) Nothing contained in this Article shall apply to any controversy or dispute arising out of any notice of reopening of this Agreement as provided in Article XXI thereof.

ARTICLE XIV

(84) Agreements, national in scope, between Sheet Metal Workers' International Association and other International Unions, covering work jurisdiction and the assignment, allocation and division of work among employees represented for the purposes of collective bargaining by such labor organizations, shall be respected and applied by the Employer, provided such Agreements have been consummated with the knowledge of and without objection from Sheet Metal and Air Conditioning Contractors' National Association, Inc.

(85) Pre-Job Conference—A pre-job conference will be held upon request of the Union or a Contractor when there exists a threat of a dispute between affiliates of the Northwestern Ohio Building and Construction Trades Council to the Jurisdictional Committee as established between the AFL-CIO. Pending the submission and settlement of the dispute the affiliated of the Northwestern Ohio Building and Construction Trades Council will man the job without work stoppages or interference with the Contractors' work.

(86) Jurisdictional Disputes—All jurisdictional disputes between or among building and construction

unions and employers, parties to this Agreement, shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department (plan for National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry) or any other plan or method of procedure that may be adopted in the future by the building and Construction Trades Department. Decisions rendered shall be final, binding and conclusive on the Employer and Union parties to this Agreement.

ARTICLE XV

APPRENTICESHIP

(87) All duly qualified apprentices shall be under the supervision and control of a Joint Apprentice Committee composed of six (6) members, three (3) of whom shall be selected by the Employer, and three (3) by the Union. Said Joint Apprentice Committee shall formulate and make operative such rules and regulations as they may deem necessary and which do not conflict with the specific terms of this Agreement, to govern eligibility, registration, education, transfer, wages, hours, working conditions of duly qualified apprentices and the operation of an adequate apprentice system to meet the needs and requirements of the trade. Said rules and regulations when formulated and adopted by the parties hereto shall be recognized as part of this Agreement.

(88) The Joint Apprentice Committee designated herein shall serve for the life of this Agreement, except that vacancies in said Joint Apprentice Committee caused by resignation or otherwise, may be filled by either party hereto, and it is hereby mutually agreed by both parties hereto, that they will individually and collectively cooperate to the extent that duly

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Lynn L. Breininger	)	Case No. 83-1126
	)	Honorable Nicholas J.
Plaintiff	)	Walinski, Senior Judge
	)	
v.	)	DEFENDANT LOCAL
	)	UNION'S BRIEF IN
Sheet Metal Workers	)	SUPPORT OF MOTION
International Association	)	FOR SUMMARY
Local Union No. 6	)	JUDGMENT AND/OR
	)	IN THE ALTERNATIVE
Defendant	)	TO STRIKE JURY
	)	DEMAND

I. INTRODUCTION

On or about December 13, 1983, the plaintiff Lynn L. Breininger instituted this lawsuit alleging a cause of action based on a breach of the duty of fair representation under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 151, § 158(b) and § 159 (hereinafter referred to as the "LMRA"). Subsequently, on or about March 16, 1984, the plaintiff amended his Complaint to allege a violation of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 19 U.S.C. § 411, § 412 and § 529 (hereinafter referred to as the "LMRDA"). The following brief discussion will clearly demonstrate that: (a) jurisdiction over plaintiff's Complaint is preempted by the exclusive jurisdiction of the National Labor Relations board (hereinafter referred to as the "NLRB"); (b) the duty of fair representation owed to all collective bargaining unit members by defendant Steet Metal Workers International Association Local Union No. 6 (hereinafter referred to as the "Union") has in no way been breached

by defendant Union in the instant case; and (e) defendant Union has in no way violated 29 U.S.C. §§ 411(5) and/or 529 with respect to plaintiff in making hiring hall referrals. Thus, no actionable claim exists for plaintiff under either 29 U.S.C. §§ 151, 158(b), and/or 159 or 29 U.S.C. §§ 411(5) and/or 529. Therefore, defendant Union is entitled to summary judgment on plaintiff's Complaint.

In addition, or in the alternative, defendant Union has moved this Court to strike plaintiff's demand for jury trial. As will be clearly demonstrated herein, there exists no right to jury trial on plaintiff's claim(s) under either the LMRA and/or the LMRDA. Therefore, defendant Union's Motion to Strike must be granted.

II. STATEMENT OF FACTS

The plaintiff is and has been at all times material hereto a member of defendant Union [*See*, defendant Union's June 13, 1984 deposition of plaintiff Lynn L. Breininger, hereinafter referred to as "Union deposition", at 19]. The defendant Union is signatory to a collective bargaining agreement with various contractor employers within the defendant Union's jurisdiction of the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio, and the counties of Monroe and Lenawee in Michigan [*See*, Union deposition at 27 and Union Exhibit C at 3, ¶ 2]. The plaintiff is familiar with the collective bargaining agreement [*See*, Union deposition at 22-25]. The collective bargaining agreement provides that the defendant Union refer sheet metal workers to employer contractors working within defendant Union's jurisdiction as they are requested [*See*, Union deposition at 22-25 and Union Extibit C].

The defendant Union does not maintain an exclusive hiring hall system [*See*, affidavit of David Williams]. Rather, a member of defendant Union has several options through which to obtain employment [*See*, Union deposition at 27-28]. First, a member desiring employment may have his/her name placed on the out-of-work list maintained by defendant Union at the Union hall [*See*, Union deposition at 28]. Second, a member may have his/her name placed on a separate list authorizing the defendant Union to refer him or her for work under the Specialty Agreement, a separate collective bargaining agreement negotiated to cover work on siding, decking and metal buildings [*See*, Union deposition at 44-45]. Work performed pursuant to the Specialty Agreement is paid at a wage rate lower than that of work performed under the general agreement [*See*, Union deposition at 45]. The defendant Union cannot refer a member for work under the Specialty Agreement without the member being signed up on the list for such work and working under the Specialty Agreement is strictly voluuntary [*See*, Union deposition at 44-47].

The out-of-work list maintained by the defendant Union is signed by members who want to be referred to jobs by the defendant Union [*See*, Union deposition at 29]. When an employer contacts the defendant Union for workers, and does not request workers by name, the Union begins at the top of the list and attempts to telephone each person in the order they appear on the list and continues doing so until the requisite number of people accept the job [*See*, Union deposition at 30-32, and affidavit of David Williams].

Members of defendant Union who wish to also be referred to jobs pursuant to the Specialty Agreement sign a separate list kept for this specific purpose [*See*, Union deposition at 46]. When the defendant Union receives a request for workers from an employer under to the Specialty Agreement, the defendant Union begins at the top of this list and attempts to telephone each person in the order they appear on the list and continues doing so until the requisite number of people accept the job [*See*, Union deposition at 46 and affidavit of David Williams].

Further, it is the practice of the defendant Union to also allow individuals to solicit employment on their own volition in addition to being signed up on the referral list(s) [*See*, Union deposition at 50 and affidavit of David Williams]. It is not uncommon for members of defendant Union to do so [*See*, Union deposition at 50]. The employee does not use the referral list to solicit employment on his or her own[1] [*See*, Union deposition at 28].

Finally, an employer can request for referral a specific employee or employees by name [*See*, Union deposition at 28]. In the event this occurs, the defendant Union will attempt to contact and refer the specific individual or individuals requested to the job [*See*, Union deposition at 30 and affidavit of David Williams]. If the defendant Union is unable to reach a requested individual or if that

1. In any event, a non-local contractor (a contractor that does not maintain its principal place of business within the territorial jurisdiction of the defendant Union) can only hire two (2) individuals without reference to the defendant Union's out-of-work list. The remainder of the non-local contractors manpower needs must be filled off the defendant Union's out-of-work list [*See*, affidavit of David Williams].

individual refuses the referral, the defendant Union will refer individuals in order from the out-of-work list to satisfy the employer's need for workers[2] [*See*, Union deposition at 66 and affidavit of David Williams].

In each instance of referral the person contacted by the defendant Union has the right and responsibility to either accept or refuse a job [*See*, Union deposition at 31]. Refusal to accept a job does not affect a person's place on the particular referral list in question [*See*, Union deposition at 31]. Rather, the individual maintains his or her current position on the list and will be contacted by the defendant Union by order of the list for future referral [*See*, Union deposition at 31]. Acceptance of a job will not remove a person's name from the referral list until that person has worked ten (10) consecutive working days [*See*, Union deposition at 33]. This is so due to the nature of the industry in that jobs are frequently short in duration and/or for temporary emergency work [*See*, Union deposition at 32-34].

To be referred to a job, an employee does not have to be present at the Union hall when the request by the employer is made [*See*, Union deposition at 34]. The employee will place his or her telephone number on the referral list with their name and the defendant Union will call the employee at the given telephone number when

2. In any event, a non-local contractor (a contractor that does not maintain its principal place of business within the territorial jurisdiction of the defendant Union) can only hire two (2) individuals without reference to the defendant Union's out-of-work list. The remainder of the non-local contractors manpower needs must be filled off the defendant Union's out-of-work list [*See*, affidavit of David Williams].

the employee is next on the list for referral[3] [*See*, Union deposition at 34 and affidavit of David Williams]. Further, the employee need not come to the Union hall to put his or her name on the referral list but may do this also by merely telephoning the Union hall and requesting to be put on the referral list [*See*, Union deposition at 35].

The plaintiff, Lynn L. Breininger, is personally familiar with and understands all aspects of the defendant Union's non-exclusive referral system [*See*, Union deposition at 26]. The plaintiff is also personally familiar with and understands the self-solicitation method of obtaining employment [*See*, Union deposition at 27]. The plaintiff has signed the regular out-of-work list and has been referred by defendant Union to employment from the list [*see*, Union deposition at 52-53]. However, the plaintiff has never signed the Specialty Agreement out-of-work list and is thus ineligible for referral to jobs pursuant to the Specialty Agreement [*See*, Union deposition at 46 and affidavit of David Williams]. Further, the plaintiff has also solicited and received employment on his own accord [*See*, Union deposition at 49-50].

The defendant Union has repeatedly called the plaintiff for job referrals when the plaintiff's name has come up on the list pursuant to referral procedure [*See*, Union deposition at 53, 97-98, 112, 128, 137]. Further, the defendant Union has never attempted to interfere with plain-

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3. There are occasions where defendant Union is unable to reach an individual on the out-of-work list by telephone. On these occasions, the defendant Union will contact the next person appearing on the defendant Union's out-of-work list [*See*, affidavit of David Williams].

tiff's self-solicitation of work [*See*, Union deposition at 50, 133-134 and affidavit of David Williams]. In addition, as stated by the plaintiff himself, the defendant Union has always put the plaintiff's name on the regular referral list as requested [*See*, Union deposition at 130, 135, and 137], and the defendant Union has always informed the plaintiff of his placement on the regular referral list when asked [*See*, Union deposition at 101-103]. The plaintiff has also been supplied with a copy of the collective bargaining agreement by the defendant Union [*See*, Union deposition at 24] and a copy of the Constitution and Ritual of the Sheet Metal Workers International Association (hereinafter referred to as the "International Constitution") upon request by plaintiff [*See* Union deposition at 26].

On or about March 16, 1984, the plaintiff filed a First Amended Complaint in this action [*See*, Union deposition at 5 and Union Exhibit A]. Plaintiff's Complaint alleges jurisdiction of this Court and violations of the LMRA, 29 U.S.C. § 151, § 158(b) and § 159, and of the LMRDA, 29 U.S.C. § 411, and § 529. The following brief discussion will clearly demonstrate that: (a) jurisdiction of plaintiff's Complaint is preempted by the exclusive jurisdiction of the NLRB; (b) that defendant Union has not violated any right of plaintiff pursuant to the LMRDA; and/or, in the alternative, (d) that no right to jury trial exists for any of plaintiff's claims. Therefore, defendant Union is entitled to summary judgment on plaintiff's Complaint, and/or in the alternative, plaintiff's demand for jury trial must be stricken.

III. THE DEFENDANT UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFF'S CLAIM(S) AS A MATTER OF LAW.

Rule 56(c) of the Federal Rules of Civil Procedure provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling "on a motion for summary judgment, the Court must construe the evidence in its most favorable light for the party opposing the motion and against the movant." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). However, Rule 56 of the Federal Rules of Civil Procedure goes on to provide:

> When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. If the plaintiff places such facts in evidence and reasonable minds could differ as to a material fact in issue then a genuine factual dispute exists and the motion for summary judgment must be denied. The following brief discussion will clearly demonstrate that there are no genuine disputes as to any issues of material fact and that as a matter of law the allegations

of plaintiff's Complaint are preempted and that defendant Union did not violate § 101(a)(5) and/or § 609 of the LMRDA, 19 U.S.C. § 411(a)(5) or § 529.

A. JURISDICTION OF PLAINTIFF'S COMPLAINT IS PREEMPTED BY THE EXCLUSIVE JURISDICTION OF THE NLRB.

The NLRB has exclusive jurisdiction over matters which are arguably protected by § 7 of the LMRA, 29 U.S.C. § 157, or are arguably unfair labor practices prohibited by § 8 of the LMRA, 19 U.S.C. § 158. *Farmer v. Carpenters*, 430 U.S. 290, (1977); *Machintsts v. Wisconsin Empl. Rel. Comm'n.*, 427 U.S. 132, (1976); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S. Ct. 1909, 29 L.Ed. 2d 473 (1971); *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423, 10 L.Ed. 2d 638 (1963), *reh. den.* 375 U.S. 872, 84 S. Ct. 28, 11 L.Ed. 2d 101 (1964). As was recently affirmed by this Court, discrimination against members constitutes an unfair labor practice under § 8(b)(1)(A) and § 8(b)(2) of the LMRA, 29 U.S.C. § 158(b)(1)(A), and (b)(2), and therefore, the Federal District Court's jurisdiction is preempted. *Local Lodge 355 v. Boilermakers*, — F.Supp. —, 121 LRRM 2848, 2850 (D. Ohio, 1986). *See also, Farmer, supra*, at 303, n11; *Operating Engineers Local 18*, 205 NLRB 901, 84 LRRM 1349 (1973), *enforced*, 500 F.2d 48 2932 (6th Cir. 1974).

As was stated by this Court in *Local Lodge 355, supra:*

> In the case subjudice, the controversy presented to this Court is identical to that which was presented to the NLRB. This Court is being asked to decide if de-

> fendant Local 85 discriminated in hiring hall referrals. This issue is central to both a finding of a breach of contract by defendant Local 85 and to the alleged unfair labor practice. The underlying controversy remains unchanged in both causes of action. Consequently, if this Court were to exercise jurisdiction over this cause of action, it would necessarily involve a risk of interfering with the NLRB's jurisdiction over unfair labor practices. Thus, this Court finds that its jurisdiction is preempted by the NLRB.

Id. at 121 LRRM 2850. Thus, jurisdiction over a cause(s) of action where the underlying controversy is allegation of discrimination in hiring hall referrals is preempted by the exclusive jurisdiction of the NLRB. *Local Lodge 355, supra.*

In the instant action, the controversy underlying both causes of action set forth in plaintiff's First Amended Complaint is the allegation of discrimination in hiring hall referrals [*See,* Union deposition at 5 and plaintiff's First Amended Complaint 3, ¶ 6 and 6, ¶ 17]. As this Court has ruled in *Local Lodge 355, supra,* the NLRB has exclusive jurisdiction over such claims. Thus, this Court is without jurisdiction and is precluded from hearing plaintiff's claims. Therefore, the defendant Union is entitled to summary judgment as a matter of law.

B. THE UNDISPUTED MATERIAL FACTS DEMONSTRATE NO VIOLATION OF THE LMRDA BY THE DEFENDANT UNION.

The plaintiff has alleged that the defendant Union has "otherwise disciplined" plaintiff in violation of § 101 (a)(5) and (b) and § 609 of the LMRDA, 29 U.S.C. § 411 (a)(5), (b) and § 529 in "failing to refer him for employ-

ment" and by discriminatory treatment in job referrals [*See,* plaintiff's First Amended Complaint at 6, ¶ 16, and ¶ 17]. Assuming for the purposes of argument only that jurisdiction is not preempted by the exclusive jurisdiction of the NLRB, it is clear that the defendant Union has not violated any right of plaintiff pursuant to § 101(a)(5) or § 609 of the LMRDA, 29 U.S.C. § 411(a)(5) and § 529.

The United States Supreme Court has held that the term "otherwise disciplined" as used by § 101(a)(5), (b) and § 609 of the LMRDA, 29 U.S.C. § 411(a)(5), (b) and § 529 refers only to the membership rights of union members and does not include employment rights or discrimination in employment. *Finnegan v. Leu,* 456 U.S. 431 (1982). As held by the Supreme Court, this is the case because the specifically enumerated sanctions in 29 U.S.C. § 411, and § 529 i.e., "fine, suspension, and expulsion" are all actions which can only be taken against members as members. *Finnegan v. Leu, supra.*

Consistent with the U.S. Supreme Court decision in *Finnegan v. Leu, supra,* this Court has long held that the LMRDA refers to and applies only to membership rights of Union members. *Hill v. Aro Corporation,* 275 F.Supp. 482 (N.D. Ohio, 1967). Other courts have followed this principle. *See, Turner v. Local Lodge #455,* 755 F.2d 866 (11th Cir., 1985); *Hackenburg v. Boilermakers Local 101,* 694 F.2d 1237 (10th Cir., 1982). As was stated by this Court in *Aro Corporation, supra,* § 101 of the LMRDA sets forth certain rights of union members "including freedom of speech and assembly and equal rights with other members" and that § 609 of the LMRDA makes it

unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled to "under the LMRDA. *Id.* at 488-489. This being the case, this Court in *Aro Corporation* found that the complaint, which alleged no violation of membership rights, did not state a claim upon which relief can be granted under the LMRDA.

Applying the above to the instant case, it is clear that plaintiff's allegations of discrimination in hiring hall referrals does not state a cause of action under 29 U.S.C. § 411(a)(5)(b) or 29 U.S.C. § 529. The LMRDA refers to membership rights only and not to employment rights. *Finnegan v. Leu, supra, Aro Corporation, supra.* The plaintiff's claim(s) brought pursuant to the LMRDA refer not to plaintiff's membership rights as a member but only to employment rights [*See,* plaintiff's First Amended Complaint at 6, ¶¶ 16-17]. An examination of plaintiff's own deposition demonstrates that the plaintiff has not been deprived of any membership right(s) [*See,* Union deposition at 20, 24, 26, and 27]. Specifically, plaintiff states that he has attended Union meetings [*See,* Union deposition at 20, 27]; been given upon request and has never been refused a copy of both the collective bargaining agreement and the Sheet Metal Workers International Association Constitution and Ritual [*See,* Union deposition at 24, 26]; and has voted in Union elections [*See,* Union deposition at 161, 183]. Thus, plaintiff has not been denied any membership right(s) by the defendant Union. Therefore, the defendant Union is entitled to summary judgment on plaintiff's claim as a matter of law.

IV. A JURY TRIAL IS NOT AVAILABLE TO A PLAINTIFF IN EITHER A § 301 LMRA SUIT OR A § 101 OR § 609 LMRDA SUIT.

A. THE PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL IN A SUIT UNDER § 301 OF THE LMRA.

Plaintiff's First Amended Complaint contains a demand for jury trial. Because federal labor law developed under § 301 shows that a jury trial is not available for plaintiff's claims against either defendant, the defendant Union has moved to strike the jury demand. In 1947, through § 301, Congress established court jurisdiction of "[s]uits for violation of contracts between am employer and a labor organization." In the landmark case of *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), the Supreme Court ruled that § 301 required federal courts "to fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . ." In the instant case plaintiff relies on the jurisdictional privileges of § 301. In so doing, however, plaintiff is also bound by the body of substantive federal labor law which has been developed under it. It is this specialized body of federal law, not general principles of common law, which governs all aspects of this case. *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Lynn L. Breininger	)	
	)	
Plaintiff	)	Case No. C 83-1126
	)	
vs.	)	Hon. Nicholas J. Walinski,
	)	Sr. Judge
Sheet Metal Workers	)	
International Association	)	AFFIDAVIT OF
Local Union No. 6	)	DAVID WILLIAMS
	)	
Defendant	)	

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

I, David Williams, being first duly sworn according to law do state as follows:

1. That I have personal knowledge of the facts contained in this Affidavit.

2. That I am the Business Manager/Financial Secretary-Treasurer for the Sheet Metal Workers International Association Local Union No. 6 (hereinafter referred to as the "Union"), and that I was the Business Manager for the Union at all times mentioned in this Affidavit.

3. That as the Business Manager for the Union, I am familiar with the collective bargaining agreement between the Toledo Area Sheet Metal and Roofing Contractors Association, Toledo Heating and Air Conditioning Contractors Association (hereinafter referred to as the "collective bargaining agreement") and the Union and the

Constitution and Ritual of the International Union and the job referral procedure contained in these documents.

4. That pursuant to the collective bargaining agreement, the Union operates a non-exclusive referral service. This referral service is non-exclusive since a member of the Union seeking employment as a Sheet Metal Worker can obtain employment through any of the following ways:

a. the person can be requested by name by an employer from the Union's non-exclusive referral system,

b. the person can be referred off of the Union's referral (out-of-work) list, or

c. the person can solicit his/her own employment.

5. That the Union maintains a referral (out-of-work) list under the collective bargaining agreement and a separate referral (out-of-work) list under the Siding and Decking Specialty Agreement.

6. That in any event, a non-local contractor (a contractor that does not have its principle place of business within the territorial jurisdiction of the Union) is prohibited from securing more than two (2) individuals for employment as a Sheet Metal Worker without resort to the Union's referral (out-of-work) list. The remaining manpower needs of a non-local contractor must be filled off the Union's referral (out-of-work) list.

7. That the Union's non-exclusive referral service works as follows:

a. an individual laid off from work with an employer has his/her name placed on the Union's re-

ferral (out-of-work) list by either reporting to the Union's office or calling the Union's office,

b. the individual having his/her name placed on the referral (out-of-work) list has his/her name placed at the bottom of the out-of-work list;

c. the individual is not required to be present in the Union's office during referral hours, but instead, is required to leave a telephone number at the time the member has his/her name placed on the Union's referral (out-of-work) list,

d. an employer calls the Union's office and requests a certain number of Sheet Metal Workers (as opposed to requesting employees by name),

e. the Union takes the employer's request, goes to the Union's out-of-work list, and proceeds to telephone individuals on the referral list by beginning at the top of the list and calling individuals at the telephone numbers left by the individuals in the order they are on the referral (out-of-work) list. In the event the individual is reached, the work is offered to the individual who may accept or reject the work. In the event the individual is not reached, the Union telephones the next individual on the referral (out-of-work) list. This procedure is followed until the work is accepted by the number of individuals requested by the contractor,

f. the individual accepting the work is informed when and where to report to work,

g. the individual accepting the work reports to the employer requesting Sheet Metal Workers at the date and time designated by the employer, and,

h. the individual having had his/her name removed from the referral (out-of-work) list after the person has been employed by the employer for more than ten (10) consecutive work days.

8. That the employer retains the right to hire or not to hire employees dispatched through the Union's non-exclusive referral system.

9. That pursuant to the Union's non-exclusive referral system, an employer laying off a Sheet Metal Worker for lack of work on a project can recall that Sheet Metal Worker to work on the project so long as the Union's office is notified concerning the recall.

10. That in the event an employee is requested by name by either a local contractor (a contractor that maintains its principle place of business in the territorial jurisdiction of the Union) and/or a non-local contractor that has hired less than two (2) individuals without resort to the Union's referral (out-of-work) list, the Union will attempt to contact and refer the specific individual or individuals requested by the employer. If the Union is unable to reach the requested individual(s) or if the requested individual(s) refuse the referral, the Union will refer individuals off of the referral (out-of-work) list to satisfy the employer's need for workers.

11. That on a number of occasions, Plaintiff Lynn L. Breininger has had his name placed on the Union's re-

ferral (out-of-work) list for work under the collective bargaining agreement.

12. That Plaintiff Lynn L. Breininger has never had his name placed on the referral (out-of-work) list for work under the Siding and Decking Specialty Agreement.

13. That the Union has followed referral procedure with respect to all individuals signed on the referral list(s), including the Plaintiff Lynn L. Breininger, and has telephoned the Plaintiff Lynn L. Breininger when his name came up on the regular referral list and offered the referral to him if he was at home to receive the telephone call(s).

FURTHER AFFIANT SAYETH NAUGHT.

/s/ David J. Williams
David Williams

Sworn to and subscribed in my presence this 10th day of September, 1986.

/s/ Walter J. Ceiley
Notary Public

Walter J. Ceiley
Notary Public, State of Ohio
My Commission Expires Aug. 16, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

	CASE NO. C83-1126
	Judge Nicholas J. Walinski
LYNN L. BREININGER Plaintiff	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND/OR IN THE ALTERNATIVE TO STRIKE JURY DEMAND
vs.	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION Local Union No. 6 Defendant	Francis J. Landry (4935) WASSERMAN, BRYAN, LANDRY & HONOLD 300 Inns of Court Bldg. 405 N. Huron Street Toledo, Ohio 43604 (419) 243-1239 Attorney for Plaintiff

I. INTRODUCTION

On December 13, 1983, plaintiff Lynn L. Breininger commenced the within action under the Labor Management Relations Act alleging that defendant breached its duty of fair representation in failing to refer him for employment. Subsequently, on or about March 16, 1984, plaintiff amended his judgment. *Moore's Federal Practice,* paragraph 56.15[6], 56.15[1], 56.27. However, in certain situations, the trial court may exercise a sound discretion in *denying* summary judgment in certain cases, such as when the court is not reasonably certain that there is not triable

issue of fact, or where a more complete factual record need be developed. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 96 S. Ct. 2215, 48 L.Ed. 2d 823 (1976); *Moore's Federal Practice*, Paragraphs 56.15[6] and 56.24.

Given the above discussion of nature of a Motion for Summary Judgment and the burdens placed on the moving party, plaintiff addresses the two contentions advanced by defendant in support of the Motion for Summary Judgment.

A. THIS COURT HAS JURISDICTION OVER PLAINTIFF'S COMPLAINT. DEFENDANT'S PRE-EMPTION ANALYSIS IS MISGUIDED AND BASED ON AN INAPPOSITE FACTUAL SITUATION.

In its Brief in Support of its Motion for Summary Judgment And/Or In The Alternative To Strike Jury Demand, defendant has contended that the NLRB has exclusive jurisdiction over matters which are arguably protected by Section 7 of the LMRA, 29 U.S.C. Section 157, or are arguably unfair labor practices prohibited by Section 8 of the LMRA, 29 U.S.C. Section 158. Therefore, the defendant reasons, since both causes of action in plaintiff's First Amended Complaint involve alleged discrimination in hiring hall referrals, the claims are pre-empted and this Court lacks jurisdiction.

Defendant has cited four (4) United States Supreme Court Decisions and one previous decision of this Court where one union sued another. All of the cases are inapposite as will be set forth below.

In plaintiff's first count of his First Amended Complaint, plaintiff brought a claim against defendant for an

alleged breach of said defendant's duty of fair representation. Curiously, in the one United States Supreme Court Decision omitted by defendant, *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that since a union's duty, as exclusive agent, fairly to represent all members of a designated unit is based on federal statutes, federal law governs the employee's cause of action for breach of that duty. *Vaca v. Sipes, supra*, 386 U.S. at 176, 177. Additionally, in the same decision, the Supreme Court held that although the NLRB had then recently held that a union's breach of its statutory duty of fair representation is an unfair labor practice under Section 8(b) of the National Labor Relations Act, it does not follow that the broad pre-emption doctrine defined in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, holding that the NLRB has exclusive jurisdiction over activity arguably subject to Section 8 of the Act, is applicable thereto. *Vaca v. Sipes, supra*, 386 U.S. at 177-178. The Supreme Court in *Vaca*, explained its reasoning with a threefold analysis: (1) the pre-emption doctrine has not been rigidly applied where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB; (2) the pre-emption rule has not been applied where the activity regulated was merely a peripheral concern of the LMRA; and (3) the doctrine of fair representation, which protects individuals against arbitrary union conduct, might be jeopardized by the NLRB's failure to act in certain cases, if the pre-emption doctrine were applied to oust the courts of their traditional jurisdiction to curb arbitrary union conduct. *Vaca v. Sipes, supra* 386 U.S. at 179-183.

The four Supreme Court cases cited by defendant all deal with the issue of federal pre-emption *over State Court*

Claims. In none of the cases did the plaintiff bring a claim alleging breach of a duty of fair representation. Because this issue is crucial to the Court's proper disposition of this motion, plaintiff will discuss each case in turn. In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25,* 430 U.S. 290 (1977), the Supreme Court dealt with the issue of whether certain State court claims were pre-empted by federal labor law. The Supreme Court in that very case noted that it refused to apply the pre-emption doctrine in certain circumstances, including those presented in the instant case. In *Farmers, supra,* the Supreme Court explained the nature of the pre-emption doctrine and its exceptions as follows at 430 U.S. at 286, 297:

> But the same considerations that underlie the Garmon rule have led the court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Id., at 243-244. See, e.g., *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (malicious libel); *Automobile Workers v. Russell,* 356 U.S. 634 (1958) (mass picketing and threats of violence); *Machinists v. Gonzales,* 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not deserve the interests promoted by the federal labor statutes." *Motor Coach Employees v. Lockridge,* at

297-298. *See Vaca v. Sipes, supra (duty of fair representation cases).* (emphasis added; footnotes omitted).

In footnote 8 of that opinion, the Court explained at 430 U.S. at 297, footnote 8:

> In addition to the judicially developed exceptions referred to in the text, *Congress itself has created exceptions to the Board's exclusive jurisdiction in other classes of cases.* Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, 29 U.S.C. Section 187, authorizes anyone injured in his business or property by activity violative of Section 8(b)(4) of the NLRA, 61 Stat. 140, as amended, 29 U.S.C. Section 158(b)(4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. See *Teamsters v. Morton,* 377 U.S. 252 (1964). Section 301 of the LMRA, 29 U.S.C. Section 185, authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See *Smith v. Evening News Assn.,* 371 U.S. 195 (1962). Section 14(c)(2) of the NLRA, as added by Title VII, Section 701(a) of *the Labor-Management Reporting and Disclosure Action of 1959,* 73 Stat. 541, 29 U.S.C. Section 164(c)(2), permits state agencies and state courts to assert jurisdiction over "labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

Accordingly, the facts in *Farmer, supra,* are inapposite. The language of its opinion supports plaintiff's contention that his claims are not pre-empted.

The Second Supreme Court opinion cited by defendants, *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976), dealt again with federal pre-emption on the basis of federal labor policy over the authority of a state labor relations board to enjoin a union. In that case, the Supreme Court held that

the union's concerted refusal to work overtime was peaceful conduct constituting activity that must be free of state regulation if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated. The Supreme Court noted that Congress intended that self-help economic activities, whether of employer or employee, were not to be regulable by the states any more than by the NLRB. Accordingly, the decision is inapposite with the case at bar.

In the third Supreme Court opinion cited by defendant in support of its pre-emption argument, *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971), the Court again dealt with the issue of NLRA pre-emption of State Court jurisdiction. The Court specifically noted the *Vaca v. Sipes* exception to pre-emption as follows at 403 U.S. at 297-298:

> The pre-emption doctrine we apply today is, like any other purposefully administered legal principle, not without exception. Those same considerations that underlie *Garmon* have led this Court to permit the exercise of judicial power over conduct arguably protected or prohibited by the Act where Congress has affirmatively indicated that such power should exist, *Smith v. Evening News Assn.,* 371 U.S. 195 (1962), *Teamsters Union v. Morton,* 377 U.S. 252 (1964), where this Court cannot, in spite of the force of the policies *Garmon* seeks to promote, conscientiously presume that Congress meant to intrude so deeply into areas traditionally left to local law, e.g., *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966); *Automobile Workers v. Russell,* 356 U.S. 634 (1958), *and where the particular rule of law sought to be invoked before another tribunal is so structured and administered that,*

> *in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes, Vaca v. Sipes,* 386 U.S. 171 (1967). (emphasis added).

The Supreme Court is *Lockridge, supra,* went on to explain at 403 U.S. at 299:

> Indeed, in *Vaca v. Sipes,* 386 U.S. 171 (1967), we held that an action seeking damages for injury inflected by a breach of union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement.

Note that breach of the duty of fair representation was not asserted in *Lockridge.* 403 U.S. at 299-300. The Court, moreover, explained its reasoning at 403 U.S. at 301:

> Similarly, this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment of the hands of the majority of his coworkers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not otherwise be regulated by the substantive federal law . . .

The defendant has also cited this Court's recent opinion in *Local Lodge 355 v. Boilermakers,* — F. Supp. —, 121 LRRM 2848, 2850 (N.D. Ohio, 1986), in support of its contention that discrimination against members con-

stitutes an unfair labor practice under Section 8(b)(1)(A) and Section 8(b)(2) of the LMRA, 29 U.S.C. Section 158(b)(1)(A), and (b)(2), and therefore, the Federal District Court's jurisdiction is pre-empted. That case is distinguishable for two reasons. The first point of departure is the *Local Lodge 355, supra* involved a suit by one local union against another local union. Unlike the present case, it did not constitute a claim by an aggrieved member that a union breached its duty of fair representation. Thus *Local Lodge 355* did not fall within the *Vaca v. Sipes, supra,* exception as discussed above. Secondly, in *Local Lodge 355,* the plaintiff had filed two sets of charges unsuccessfully with the NLRB. In the within case, Mr. Breininger testified in his deposition that he contacted the NLRB and was advised over the telephone that it was a contract dispute and that the NLRB did not handle it. See Breininger deposition at pp. 84-85. Note that the Supreme Court in *Vaca v. Sipes* explained that the doctrine of fair representation, which protects individuals from arbitrary union conduct, might be jeopardized by the NLRB's failure to act in certain cases, if the pre-emption doctrine were applied to oust the courts of their traditional jurisdiction to curb arbitrary union conduct. *Vaca v. Sipes, supra,* 386 U.S. at 179-183.

It is respectfully submitted, then, that this Court has jurisdiction over plaintiff's claim for breach of duty of fair representation.

With respect to plaintiff's second count of his First Amended Complaint, defendant has sweepingly alleged that pre-emption is applicable again for the reason that the NLRB has jurisdiction of an action where the underlying controversy is allegation of discrimination in hiring hall referrals. Defendant has cited no authority in support of its assertion that plaintiff's LMRDA claim is pre-empted. In response, plaintiff contends that in the LMRDA enacted in 1959, Congress provided for a direct civil action in federal district court by a union member against his local union. It is important to note that this federal cause of action was created prior to the NLRB's decision, in 1962, to treat discriminatory referrals as an unfair labor practice under 8(b)(1)(A). Accordingly, the same reasoning employed by the Supreme Court in *Vaca v. Sipes, supra,* is applicable by analogy.

More importantly, courts have held that union members' suits asserting violations of rights guaranteed under the LMRDA are not subject to pre-emption by the NLRB as the rights granted under the LMRDA are cumulative to those under the NLRA. See *Miller v. Holden,* 535 F. 2d 912 (5th Cir. 1976); *Cooke v. Orange Belt District Council of Painters No. 48,* 529 F. 2d 815 (9th Cir. 1976); *U.S. v. Local 560,* 550 F. Supp. 511 (D.N.J. 1982); *Keenan v. Metropolitan District Council of Philadelphia,* 266 F. Supp. 497 (D.Pa. 1966); *Schmid v. United Brotherhood of Carpenters and Joiners of America,* 773 F. 2d 993 (8th Cir. 1985). In *Vanderventer v. Local Union No. 513 of Int'l Union of Operating Engineers,* 579 F. 2d 1373 (8 Cir.), *cert. denied,* 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed. 2d 656 (1978), the court held that a union member's complaint charging a union with discrimination in job referrals was not pre-empted by the NLRB.

For the reasons set forth above, this court should overrule defendant's motion for summary judgment as based on its pre-emption argument.

B. PLAINTIFF HAS BROUGHT FORTH MATERIAL FACTS EVIDENCING A VIOLATION OF THE LMRDA BY THE DEFENDANT UNION.

• • •

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Lynn L. Breininger,	)	
	)	
Plaintiff,	)	Case No. C 83-1126
	)	
vs.	)	Judge Nicholas Walinski
	)	
Sheet Metal Workers	)	NOTICE OF APPEAL
International Association,	)	
Local Union No. 6,	)	(Filed March 10, 1987)
	)	
Defendant	)	

Notice is hereby given that Lynn L. Breininger, plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment granting the defendant's Motion for Summary Judgment and dismissing Plaintiff's Complaint entered in this action the 23rd day of February, 1987 based upon the Opinion and Order dated and filed on February 20, 1987.

Respectfully submitted,

/s/ Francis J. Landry
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed this 10th day of March, 1987 by ordinary U.S. Mail to Jeffrey Julius, Esq., Gallon, Kalniz & Iorio Co., L.P.A., 3161 North Republic Blvd., P.O. Box 7417, Toledo, Ohio 43615, attorney for defendant, Sheet Metal Workers' International Association, Local Union No. 6.

/s/ Francis J. Landry
Francis J. Landry

FJL/cap
3/6/87

(5)

No. 88-124

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a union member's claim that his union breached its duty of fair representation by engaging in discriminatory job referrals may be brought in Federal District Court in an action invoking the court's jurisdiction under 28 U.S.C. Section 1337?

B. Whether a union member who claims that his union breached its duty of fair representation by engaging in discriminatory job referrals may maintain an action against his union in Federal District Court notwithstanding the absence of an affirmative allegation that an employer breached a collective bargaining agreement?

C. Whether a union's discriminatory refusal to refer its member to jobs constitutes "discipline" within the meaning of the Labor Management Reporting and Disclosure Act and whether a union member's claim brought pursuant to the Labor Management Reporting and Disclosure Act dealing with discriminatory job referrals is pre-empted by the jurisdiction of the National Labor Relations Board?

PARTIES TO PROCEEDINGS BELOW

Lynn L. Breininger, plaintiff-appellant below and petitioner herein, is and was a member of Sheet Metal Workers International Association Local Union No. 6 since he entered its apprenticeship program in 1949.

Sheet Metal Workers International Association Local Union No. 6, defendant-appellee below and respondent herein, is a labor organization representing journeymen and apprentice sheet metal workers and a party to a multi-employer collective bargaining agreement covering the Toledo, Ohio area and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan.

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CITATIONS TO OPINIONS BELOW

The March 1, 1988 opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is sought to be reviewed was originally not recommended for publication in accordance with its Local Rules. On June 15, 1988, the United States Court of Appeals for the Sixth Circuit granted a motion for publication of its March 1, 1988 decision. The decision has been published and the citation is 849 F.2d 997 (6th Cir. 1988). Said decision has been set forth in the Separate Appendix to the Petition for Writ of Certiorari filed July 20, 1988 at Appendix A, pp. A1 to A3.

The prior opinion of the United States District Court for the Northern District of Ohio, Western Division, in Case No. C83-1126 is an unreported decision and has been set forth in Appendix B at pp. A4 to A11.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 1, 1988. On March 15, 1988, petitioner filed a timely petition for rehearing before the United States Court of Appeals for the Sixth Circuit. In its Order filed on April 22, 1988, the United States Court of Appeals for the Sixth Circuit denied petitioner's petition for rehearing. On July 20, 1988, petitioner filed a timely Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Said Petition was granted on February 21, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

o

STATUTORY PROVISIONS INVOLVED

28 U.S.C. SECTION 1337

Section 1337. Commerce and antitrust regulations: amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, that the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 U.S.C. Section 11707], only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49 [49 U.S.C. Section 11707], originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title [28 U.S.C. Sections 1581 et seq.].

29 U.S.C. SECTION 158b(1)(A)

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. Section 157]: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein:

29 U.S.C. SECTION 159. REPRESENTATIONS AND ELECTIONS

(a) *Exclusive representatives-Employees adjustment of grievances directly with employer.* Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. SECTION 411(a)(5)

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A)

served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. SECTION 412. CIVIL ACTION FOR INFRINGEMENT OF RIGHTS; JURISDICTION

Any person whose rights secured by the provisions of this title [29 U.S.C. Section 411 et seq.] have been infringed by any violation of this title [29 U.S.C. Section 411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. SECTION 529. PROHIBITION ON CERTAIN DISCIPLINE BY LABOR ORGANIZATION

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provision of section 102 [29 U.S.C. Section 412] shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

Petitioner challenges the judgment entered March 1, 1988, of the United States Court of Appeals for the Sixth Circuit which affirmed a dismissal by the United States District Court for the Northern District of Ohio Western Division of petitioner's First Amended Complaint which

alleged (1) that the Sheet Metal Workers International Association Local Union No. 6 (hereinafter "Local 6") breached its duty of fair representation by engaging in discriminatory job referrals to petitioner's detriment, by refusing to refer petitioner to a job site despite an employer's request, and by refusing to process charges filed by petitioner relating to job referrals under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Workers International Association; and (2) that the said Local 6 engaged in the above described conduct because of petitioner's previous support of unsuccessful candidates for business manager and business agent as part of said local's widespread, improper "discipline" for political opposition in violation of 29 U.S.C. Section 411(5), 29 U.S.C. Section 412 and 29 U.S.C. Section 529. (See First Amended Complaint; R. 4).

Petitioner filed his First Amended Complaint in the United States District Court for the Northern District of Ohio, Western Division on April 3, 1984. The First Amended Complaint contained two separate counts. The First Count invoked the Court's jurisdiction for respondent's alleged breach of the duty of fair representation pursuant to 29 U.S.C. Sections 151, 158(b), and 159. In his First Amended Complaint, petitioner Breininger specifically noted, with respect to the duty of fair representation claim, that no corresponding breach of contract by an employer was included and that, therefore, federal jurisdiction was being asserted under 28 U.S.C. Section 1337. (See First Amended Complaint Jury Demand Endorsed Herein at p. 1; R. 4). In the Second Count of his First Amended Complaint, petitioner invoked the Court's jur-

isdiction pursuant to 29 U.S.C. Sections 411, 412, and 529, the Labor Management Reporting and Disclosure Act of 1959, as amended.

Subsequent to filing his First Amended Complaint, discovery then ensued in the District Court. Discovery included documentary discovery, depositions of plaintiff, and depositions of David Williams and Michael Duffey, then officers of respondent Local 6. (See Deposition of Michael Duffey filed 11/19/86; R. 24: Deposition of David Williams filed 11/19/86; R. 25: Deposition of Lynn L. Breininger filed 12/11/86; R. 28). Petitioner also subpoenaed from Northwestern Ohio Administrators Association records of Health and Welfare contributions made by employers on behalf of individual members of Local 6. (Opposition of Plaintiff to motion filed 9/10/86 with Exhibits, Composite Exhibit I; R. 26).

On September 10, 1986, respondent Local 6 filed a Motion for Summary Judgment and/or In the Alternative to Strike Jury Demand (R. 23). In moving for summary judgment, the respondent Local 6 contended that jurisdiction over plaintiff's First Amended Complaint was preempted in its entirety by the exclusive jurisdiction of the National Labor Relations Board. Alternatively, the respondent Local 6 contended that it did not violate 29 U.S.C. Section 411(5) and Section 529 with respect to making hiring hall referrals in that such discrimination would not constitute "other discipline" within the meaning of the Labor Management Reporting and Disclosure Act. The respondent Local 6 additionally contended that a jury right was not available to petitioner on either claim. Petitioner Breininger opposed the motion of respondent

Local 6 for summary judgment in all respects. (Opposition of plaintiff to motion filed 9/10/86 with Exhibits; R. 26).

In its opinion and order filed on February 20, 1987, the United States District Court for the Northern District of Ohio, Western Division granted respondent Local 6's Motion for Summary Judgment on jurisdictional grounds. (Opinion and Order and Judgment; R. 29, 30). The District Court based its Opinion and Order exclusively on its finding that the National Labor Relations Board has exclusive jurisdiction over hiring hall referrals in that they constitute an unfair labor practice under Sections 8(b)(1)(A) and 8(b)(2) of the NLRA. Therefore the Court dismissed petitioner's claims solely on jurisdictional grounds and held that the remainder of respondent's Motion for Summary Judgment and/or In the Alternative to Strike Jury Demand was moot and denied. (Opinion and Order filed February 20, 1987; R. 29). Thereafter on March 10, 1987, petitioner filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit (Notice of Appeal; R. 31). After briefing on the merits and oral argument, the United States Court of Appeals for the Sixth Circuit, in a *per curiam* opinion, affirmed the opinion of the District Court in all respects. (See Appendix A, pages A1-A3 of Appendix to Petition for Writ of Certiorari). In its March 1, 1988 opinion, the Sixth Circuit held that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRA. Therefore, the Sixth Circuit reasoned, NLRA fair representation claims must be brought before the NLRA. Moreover, the Sixth Circuit held that petitioner's LMRDA claim was without merit because petitioner did not demonstrate that he was

properly "disciplined" within the meaning of the LMRDA. On March 15, 1988, petitioner Breininger filed a timely Petition for Rehearing before the Sixth Circuit. (Petition for Rehearing; R. 13). This Petition was denied by the Sixth Circuit without further opinion. (Order Petition for Rehearing Denied; R. 14). On July 20, 1988, petitioner Breininger filed his Petition for a Writ of Certiorari with this Court.

Petitioner Breininger was a long time member of the respondent Local 6 and entered respondent's apprenticeship program in 1949. (Deposition of Lynn L. Breininger, p. 15; R. 28). In fact, Breininger had served as a steward on a couple of occasions. (Deposition of Lynn L. Breininger at pp. 20-21; R. 28). Petitioner testified that one contract covered all sheet metal contractors in the jurisdiction of Local 6. (Deposition of Lynn L. Breininger, p. 27; R. 28). The applicable contract refers to the areas including Toledo, Ohio and the Counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock, Seneca in Ohio and Monroe and Lenawee Counties in Michigan. (J.A. 25, 26). In Article V of the multi-employer contract, it was specifically noted that employers agreed to confirm in writing to respondent Local 6 when requesting employees. (J.A. 29). David Williams, then business manager, testified in his deposition that the letter of request language was inserted in the Contract in 1980. (Deposition of David Williams at p. 10; R. 25).

Breininger testified in his deposition that when an employer requests an employee by name, the union attempts to obtain a written letter from the contractor verifying their request. Mr. Breininger added that there were

times when the then business agent and/or business manager Messrs. Duffey and Williams, did not do that. (Deposition of Lynn L. Breininger at pp. 35 and 36; R. 28).

In paragraph 6 of his First Amended Complaint, petitioner Breininger alleged that on April 6, 1983, Venderbush Industrial Corporation, a contractor from the outside of the respondent Local 6's jurisdiction, specifically requested petitioner's presence at the Enrico Fermi Power Unit Job No. 2657 in Newport, Michigan, on Monday, April 9, 1983. (Deposition of Lynn L. Breininger at pp. 56-66; R. 28). David Williams, then business manager of respondent, admitted that the Fermi job site was in the jurisdiction of Local 6. (Deposition of David Williams at p. 8; R. 25). Breininger testified that an out-of-jurisdiction contractor was allowed to bring two employees into the jurisdiction of Local 6. Moreover, Breininger also noted that when an out-of-town contractor "comes in here, he is treated the same as local contractors according to this because he signs the agreement." (Deposition of Lynn L. Breininger at p. 39; R. 28). Petitioner submits that two other men were referred by respondent out of sequence of the union's job referral list to his detriment. (Opposition to Plaintiff's Motion filed 9/10/86 with Exhibits at pp. 5 and 6, and Exhibit "C" thereto; R. 26).

Petitioner testified that he had filed charges with the International Union and that he had contacted the National Labor Relations Board only to be informed that the instant matter was a contract dispute and the NLRB did not handle that sort of claim. (J.A. 14, 15). Breininger also testified in his deposition that Mr. Nunally, one of the persons referred by the union to the Venderbush job of

sequence to the list, was a member of the "Concerned Brothers," Local 6 group that backed the administration of Duffey and Williams. (J.A. 19).

The most serious discrimination with respect to job referrals, according to Breininger, were those made by respondent to Bechtel Power Company on the Fermi job site. (J.A. 15-19, 22, 23). Petitioner testified that he had not worked at Bechtel and that the majority of those sent there on a repeated basis were members of the "Concerned Brothers" political group. (J.A. 15-18). The Concerned Brothers backed the then present administration and received special treatments while the other group was largely not working. (J.A. 18, 19). Petitioner added that one Don Reaume, an ex-business manager laid off in December of 1982, below Breininger on the out-of-work list, was sent to the Bechtel work site. (Deposition of Lynn L. Breininger at pp. 175-176; R. 28). Petitioner also testified that when a member worked for someone who was laid off, the member must have a letter of request to get back in. (Deposition of Lynn L. Breininger at p. 146; R. 28). In the litigation in District Court, petitioner had requested production of all written job requests. The first request dated chronologically is January 11, 1983, three years after the contract provision was placed into effect. None were submitted by Bechtel Power Company from January 11, 1983, through May 8, 1984. Moreover, no termination notices were produced by the respondent which pertained to members who worked in Bechtel Power Company. (Opposition to Plaintiff's Motion filed 9/10/86 with Exhibits. Exhibit "C" thereto; R. 26).

With respect to petitioner's LMRDA claims, Breininger testified in deposition that he had participated in

handing out pencils for Don Reaume, the former business manager, and Bob Goode, former business agent. (J.A. 20, 21). Breininger also testified that Mr. Duffey was aware that Breininger was opposed to him politically. (Deposition of Lynn L. Breininger at pp. 185-191; R. 28).

In his Memorandum in Opposition to Motion for Summary Judgment, Mr. Breininger submitted a number of composite exhibits detailing the alleged discrimination. (See Opposition to Plaintiff's Motion filed 9/10/86 with Exhibits. Exhibits "A" through "I"; R. 26).

SUMMARY OF ARGUMENT

A union member who complains that his union arbitrarily, discriminatorily and/or in bad faith without reason or cause breached its statutory duty of fair representation to him by refusing to refer him to jobs on the out-of-work list, by refusing to honor an employer request for his employment, and by refusing to process charges related to the operation of a job referral list may bring an action in Federal District Court alleging a breach of the duty of fair representation. The Jurisdiction of the Federal District Court is concurrent with that of the National Labor Relations Board and is based upon 28 U.S.C. Section 1337; *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed.2d 842 (1967); *Amalgated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). Nor is an allegation that an employer breached a collective bargaining agreement a precondition or a pre-

sequisite to a Federal Court's concurrent jurisdiction to hear duty of fair representation suits in cases alleging improper job referrals. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). The District Court, therefore, had jurisdiction to proceed to the merits of petitioner's duty of fair representation claims.

A Federal District Court has concurrent jurisdiction over a union member's claim that his union, in allegedly failing to refer him to jobs in retaliation for political opposition, violated the Labor Management Reporting and Disclosure Act. Such claims, involving job referrals, are not pre-empted by the National Labor Relations Board's jurisdiction. *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971). A union's operation of its job referral system to exclude a member from consideration for referrals can affect his rights as a member and can constitute "discipline" within the meaning of the LMRDA. Whether such exclusion rose to the level of "discipline" is an issue of fact for the trial court to determine.

———o———

ARGUMENT

A. A UNION MEMBER'S CLAIM THAT HIS UNION BREACHED ITS DUTY OF FAIR REPRESENTATION BY ENGAGING IN DISCRIMINATORY JOB REFERRALS MAY BE BROUGHT IN FEDERAL DISTRICT COURT IN AN ACTION INVOKING THE COURT'S JURISDICTION UNDER 28 U.S.C. SECTION 1337.

In the within case, petitioner had invoked the jurisdiction of the United States District Court for the Northern District of Ohio, Western Division pursuant to 28 U.S.C. Sections 1331, 1337, 1343(4), and 28 U.S.C. Sections 2201 and 2202. As to the first count of his First Amended Complaint, petitioner further alleged that his suit was brought pursuant to 29 U.S.C. Sections 151, 158(b) and 159, based on allegations of the breach of duty of fair representation. A careful reading of the first paragraph of petitioner's First Amended Complaint will reveal that when that document was filed in early 1984, petitioner specifically distinguished his lawsuit to note that his duty of fair representation claim was based on 28 U.S.C. Section 1337 and that it did not involve a breach of a collective bargaining agreement by an employer. (First Amended Complaint with Jury Demand; R. 4). This was petitioner's attempt to make it clear that this was not a "hybrid" Section 301 suit as is more prevalent in cases filed in District Courts. It is respectfully submitted that the United States Court of Appeals for the Sixth Circuit has erroneously decided in the within case that a union member who has alleged that his union breached its duty of fair representation by failing to refer him to jobs must bring that claim to the National Labor Relations Board. The Sixth

Circuit by its decision has divested union members of their rights to invoke the federal court's jurisdiction in order to supervise union conduct. In the within case petitioner Breininger alleged in his First Amended Complaint that the respondent's course of conduct was arbitrary, discriminatory and in bad faith without reason or cause. Moreover, the conduct complained of by petitioner Breininger in his First Amended Complaint went beyond the mere administration of a job referral list. Close examination of the First Amended Complaint, including paragraphs 7, 11, 12, and 13, reveals that Breininger's duty of fair representation claims involved the union's actual failure to honor an employer's letter of request as is set forth in the applicable collective bargaining agreement. (J.A. 29). Moreover, Breininger complained that despite the fact that he filed a charge under Article 18, Section 1 of the Constitution and Ritual Sheet Metal Worker's International Association with the respondent no action was taken at the time his First Amended Complaint was filed. In the court below, the Sixth Circuit held that the District Court lacked jurisdiction over petitioner's duty of fair representation's claims and cited *Local 100: Journeymen v. Borden,* 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963), for the proposition that the National Labor Relations Board has exclusive jurisdiction over claims of discrimination and job referrals. It is respectfully submitted that the Sixth Circuit's opinion is in conflict with other courts of appeals, other decisions of this court and other panels of the Sixth Circuit. In *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed.2d 842 (1967), this court held that since a union's duty, as exclusive agent, fairly to represent all members of a designated unit is based on federal stat-

utes, federal law governs the employee's cause of action for breach of that duty. In fact the statutory duty of fair representation was developed over forty (40) years ago in cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act. See *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192, 655 S.Ct. 226, 89 L.Ed. 173 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944). This statutory duty of fair representation was soon extended to unions certified under the National Labor Relations Act. *Ford Motor Co. v. Huffman,* 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). In *Vaca v. Sipes,* this court held that although the National Labor Relations Board had then recently held that a union's breach of its statutory duty of fair representation is an unfair labor practice under Section 8(b) of the National Labor Relations Act, it did not follow that the broad pre-emption doctrine defined in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), is applicable thereto. This court noted in *Vaca v. Sipes* that although Section 8(b) of the National Labor Relations Act was enacted in 1947, the National Labor Relations Board did not until *Miranda Fuel* interpret a breach of a union's duty of fair representation as an unfair labor practice. This court went on to note that the pre-emption doctrine has never been rigidly implied to cases where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the National Labor Relations Board. See *Vaca v. Sipes, supra* at 386 U.S. 171. This court also noted that Congress has created numerous exceptions to the Board's exclusive jurisdiction.

In *Vcca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed. 2d 842 (1967), this court also noted that a primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the Labor Relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable in cases involving alleged breaches of a union'sduty of fair representation. This court explained as follows at 386 U.S. at 181:

> The doctrine was judicially developed in Steele and its progeny, in suits alleging breach of the duty remain judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the LMRA. Moreover, when the board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the board adopted and applied the doctrine as it had been developed by the gederal courts. (See 140 ULRB at 184-186). Finally, as the dissenting board members in *Miranda Fuel* have pointed out, fair representation duty suits often require review of substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of their grievance machinery; as these matters are not normally within the board's unfair labor practice jurisdiction, it can be doubted whether the board brings substantially greater expertise to bear on these problems than do the courts , which have been engaged in this type of review since the *Steele* decision.

Moreover, as this court noted in *Vaca v. Sipes,* the collective bargaining system was encouraged by Congress and as administered by the National Labor Relations Board of necessity subordinates the interest of an individual employee to the collective interest of all employees of

the bargaining unit. A concern voiced by this court in *Vaca v. Sipes* is still paramount at this time in that if this court were to hold that courts are foreclosed from traditional supervisory decisions in claims alleging breaches of duty of fair representation the individual employee injured by arbitrary or discriminatory union conduct could "no longer be assured of impartial review of his complaint, since the board's general counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint". The public interest in effectuating the policies of the Federal Labor Laws, not the wrong done the individual employee, is always the board's principal concern in fashioning unfair labor practices. See *Vaca v. Sipes,* 386 U.S. 171 at 182 Footnote 8. Thus, this court noted that the existence of even a small group of cases in which the board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine and this court concluded that it could not assume from the National Labor Relations Board's tardy assumption of jurisdiction in these cases that Congress, when it enacted the NLRA Section 8(b), in 1947, intended to oust the courts of their traditional jurisdiction over claims of arbitrary conduct by the individual employee's statutory representative.

In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), this court explained that actions seeking damages for breach of a union's duty of fair representation exist concurrently with the National Labor Relations Board's remedies.

Moreover, in *Communication Workers of America v. Beck*, — U. S. —, 108 S.Ct. 2641 (1988), this court held that Federal Courts may resolve unfair labor practice questions that emerge as collateral issues and suits brought under independent federal remedies. The court specifically noted that one remedy over which federal jurisdiction is well settled is the judicially implied duty of fair representation. The court noted that the Federal Court's jurisdiction to adjudicate fair representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well. See also *Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

In the within case as set forth above, petitioner alleged in his First Amended Complaint that "in refusing to honor employer requests for plaintiff's employment, and refusing to properly administer the job seniority list and in refusing to process and/or acknowledge these charges, the defendant union, in its representation of plaintiff, has acted arbitrarily, discriminatorily and/or in bad faith and/or without reason or cause. (See First Amended Complaint; R. 4). It is submitted that the existence of an independent remedy for breach of duty of fair representation has been well settled by this court and that plaintiff's complaint properly sets forth a claim for breach of duty of fair representation in the union's administration of the contract and in the union's failure to process its own internal grievance procedure with respect to plaintiff's claims. Therefore, it is respectfully submitted that the District Court and the Sixth Circuit's decision holding declining jurisdiction were erroneous.

Other courts of appeals and other panels of the Sixth Circuit have agreed that fair representation of claims are not within the National Labor Relations Board's exclusive jurisdiction. See e.g. *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985); *Journeymen Pipefitters Local 392 v. NLRB*, 712 F.2d 225, 228-229 (6th Cir. 1983); *Lewis v. Local Union No. 100 of Laborers International Union of North America*, 750 F.2d 1368, 1375-1377 (7th Cir. 1984); *In re: Carter*, 612 F.2d 1093, 1104 (5th Cir. 1980); *Beriault, Local 40 Super Cargoes and Checkers*, 501 F.2d 258, 263-265 (9th Cir. 1974); *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741, 745-749 (5th Cir. 1974). In the within case the Sixth Circuit appears to stand alone, holding that a properly pleaded fair representation claim is preempted by the National Labor Relations Act and its suggestion that other cases support its decision is based upon inapposite authority.

It is respectfully submitted in that petitioner's complaint stated a fair representation claim that the district court had jurisdiction under 28 U.S.C. Sections 1331 and 1337 to proceed to the merits. Since the collective bargaining agreement in the within case established a referral system for employment for members of the bargaining unit, respondent's operation of that system represented the administration of the collective bargaining agreement thus rendering its operation of the referral system arguably within the scope of the union's duty of fair representation.

The National Labor Relations Board and Courts of Appeals have held that a union breaches its duty of fair

representation to members of the bargaining unit when it discriminates or acts arbitrarily or in bad faith in the operation of an exclusive hiring hall referral system. *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir. 1971); *Pipe Fitters Local 392 (Kaiser Engineers),* 252 NLRB 417, 421-422 (1980). In the within case, the district court found that the referral system was non-exclusive. (Opinion and Order filed 2/20/87; R. 29). However, the district court's opinion based its finding on the fact that the record shows that union *members* possessed alternative methods in order to obtain employment. In fact the respondent in contending that the referral system was non-exclusive contended in the district court that *members* of the respondent had several options through which to obtain employment. (J.A. 43, 44, 45). Moreover, in his affidavit which was annexed as an exhibit to Respondent's Motion for Summary Judgment in the District Court, David Williams, then business manager for the respondent, noted that the respondent's referral service "was non-exclusive since a *member* of the union seeking employment as a sheet metal worker can obtain employment through any of the following ways . . ." (J.A. 54-58).

Although the respondent has attempted to label this system as "non-exclusive", there is no showing in the record and the district court did not reach the issue of whether the referral system operated by respondent was available to non-union members as well as union members. It is respectfully submitted that the district court's finding that the referral system was non-exclusive and the Sixth Circuit's finding that "hiring all referrals are not a function of union membership since referrals are available to members as well as non-mem-

bers" are not supported by the record as the respondent's contentions as to the non-exclusivity of the referral system reached only the issue of whether a union member was required to seek employment only through the out-of-work list. (See generally Deposition of Michael Duffey filed 11/19/86; R. 24; Deposition of David Williams filed 11/19/86; R. 25).

In his deposition which is filed with the district court, David Williams, then the business manager for the respondent, testified that a member of Local 6 was required to have an introductory card before he went to work regardless of whether he sought his own employment through a local contractor or not. (Deposition of David Williams filed 11/19/86, p. 29; R. 25). A referral system is considered exclusive "if the union has exclusive authority to provide workers to employers, even if that authority is limited to a specified period of time or to a specified percentage of the work force". *Carpenter's Local 608 (various employers),* 279 NLRB 747, 754 (1986), enforced on other grounds, 811 F.2d 149 (2nd Cir. 1987), *cert. denied* — U.S. — (1987). In the present case, the collective bargaining agreement provides that the employer may hire sufficient men to man his work if the union cannot furnish same within a period of 48 hours after their request. (J.A. 29). Moreover, in his deposition Michael Duffey, former officer of the respondent, testified that even if the union member was requested by a contractor an introductory card was provided by the respondent. (Deposition of Michael Duffey filed 11/19/86, pp. 78, 79; R. 24). It is respectfully submitted that based on the record before the District Court it was not established by the respondent that its referral systems were non-exclusive. Therefore, any remand by this court should address this issue and

instruct the District Court to redetermine the issue of whether the respondents maintained an exclusive or non-exclusive referral system based on applicable law.

However, even if the referral system were non-exclusive, it should be noted that the National Labor Relations Board has held that a union operating a non-exclusive referral system violates Section 8(b)(1)(a) of the NLRA if it refuses to refer an employee because of the employee's exercise of rights protected by Section 7, 29 U.S.C. Section 157. *Chauffeur's Union, Local 923 (Yellow Cab)*, 172 NLRB 2137 (1968); *Hoisting and Portable Engineers, Local 4 (Carlson Corp.)*, 189 NLRB 366, 367 (1971), enforced, 456 F.2d 242 (1st Cir. 1972). The National Labor Relations Board has not, as of the present time, ruled directly on whether such conduct would also violate the union's duty of fair representation but the substantive issues would be matters to be addressed to the lower court on remand.

B. A UNION MEMBER WHO CLAIMS THAT HIS UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION BY ENGAGING IN DISCRIMINATORY JOB REFERRALS MAY MAINTAIN AN ACTION AGAINST HIS UNION IN FEDERAL DISTRICT COURT NOTWITHSTANDING THE ABSENCE OF AN AFFIRMATIVE ALLEGATION THAT AN EMPLOYER BREACHED A COLLECTIVE BARGAINING AGREEMENT.

In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), this court noted at 403 U.S. at 299:

> . . . indeed, in *Vaca v. Sipes*, 386 U.S. 171 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement.

See also *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 (5th Cir. 1974).

The internal conflict within the Sixth Circuit is highlighted by reviewing *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985), wherein the Sixth Circuit held that claims for breach of a union's duty of fair representation are within the Section 1337 jurisdiction of Federal District Courts even when there is no accompanying claim under Section 301 for breach of contract. In *Storey, supra*, the Sixth Circuit adopted the jurisdictional view of the issue and specifically embraced the 5th Circuit view in *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 (5th Cir. 1974). See also *Lewis v. Local Union No. 100 of Laborers International Union of North America*, 750 F.2d 1368 (7th Cir. 1984).

It is respectfully submitted in holding that corresponding breach of a collective bargaining agreement is a precondition to suit for duty of fair representation, the Sixth Circuit's decision was erroneous and in conflict with its own authority, other Circuits and this court.

C. A UNION'S DISCRIMINATORY REFUSAL TO REFER ITS MEMBER TO JOBS CONSTITUTES "DISCIPLINE" WITHIN THE MEANING OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT AND A UNION MEMBER'S CLAIM BROUGHT PURSUANT TO THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT DEALING WITH DISCRIMINATORY JOB REFERRALS IS NOT PRE-EMPTED BY THE JURISDICTION OF THE NLRB.

In its *per curiam* opinion filed March 1, 1988, the United States Court of Appeals for the Sixth Circuit held in part that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB and that, therefore, petitioner's claim pursuant to 29 U.S.C. Sections 411(a)(5), 412, and 529 (Labor Management Reporting and Disclosure Act) was pre-empted by the Board's exclusive jurisdiction. It is respectfully submitted that the Sixth Circuit's pre-emption analysis relative to petitioner's LMRDA claim is misguided. In *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971), this Court rejected the union's argument that because the suit involved a claim that the union had discriminated in job referrals, the action was subject to the NLRB's exclusive jurisdiction (401 U.S. at 239).

Moreover, Courts of Appeals have uniformly concluded that LMRDA claims are not pre-empted and that claims alleging violations of rights granted under the LMRDA are cumulative to those granted under the National Labor Relations Act. See *Schmid v. United Brotherhood of Carpenters and Joiners of America*, 773 F.2d 993 (8th Cir. 1985); *Quinn v. DiGuilian*, 739 F.2d 637 (D.C. Cir. 1984); *Vandeventer v. Local Union No. 513 of the International Union of Operating Engineers*, 579 F.2d 1373 (8th Cir.), *cert. denied*, 439 U.S. 984 (1978); *Keene v. International Union of Operating Engineers, Local 624*, 569 F.2d 1325 (5th Cir. 1978). It is respectfully submitted that the Sixth Circuit's decision was erroneous in this regard.

In its March 1, 1988 opinion, the United States Court of Appeals for the Sixth Circuit also held that petitioner's LMRDA claim was without merit because he did not demonstrate that he was improperly "disciplined." Section 101(a) of the LMRDA. 29 U.S.C. of 411(a) establishes a "Bill of Rights" for union members. Among those rights is a right to specified procedural due process before one is "fined, suspended, expelled or otherwise disciplined" by a union. (29 U.S.C. Section 411(a)(5)). Under Section 102 of the LMRDA, 29 U.S.C. Section 412, a person whose rights have been infringed by a violation of Section 101 may seek relief in a Federal District Court. Section 609 of The Act. 29 U.S.C. Section 529 also makes it unlawful for a union to "fine, suspend, expel or otherwise discipline" any of its members for exercising any rights he is entitled to under the provisions of the LMRDA. Petitioner's First Amended Complaint cited all of the above provisions and alleged that the respondent Union "disciplined" him for his political activities by discriminating against him in job referral.

In its March 1, 1988 opinion, the Sixth Circuit held that petitioner's LMRDA claim must fail because petitioner did not demonstrate that he was improperly disciplined. Applying *Finnegan v. Leu*, 456 U.S. 431 (1982),

the Court held that the term "discipline" was meant to refer only to punitive actions diminishing membership rights. The Sixth Circuit reasoned that the LMRDA's Bill of Rights was intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment. The Sixth Circuit noted that since hiring hall referrals were not a function of union membership since referrals were available to non-members as well as members, discrimination in the referral system because it did not breach the employee's union membership rights did not constitute "discipline" within the meaning of the LMRDA. In *Finnegan v. Leu*, 456 U.S. 431 (1982), this Court held that discharges from *appointed* policy-making decisions are exempt from the LMRDA. In *Sheet Metal Workers International Association v. Lynn*, 488 U.S. —, 109 S.Ct. —, 102 L.Ed.2d 700 (1989), this Court held that *elected* union officials may not be discharged on the basis of their protected political activity. In the within case, petitioner was a long time union rank and file member. It is respectfully submitted that the considerations supporting the Court's determinations in *Finnegan v. Leu* are not applicable given the fact that petitioner is a rank and file union member.

In *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114 (1985), *cert. denied*, 475 U.S. 1017 (1986), a different panel of the Sixth Circuit held that a union's action in foreclosing a member's participation in a work referral program was an action which set him apart from other members in good standing. Such a sanction, in the words of the Sixth Circuit, unquestionably affected the member's membership rights. In his

First Amended Complaint and in evidence submitted to the District Court, petitioner demonstrated that he had been systematically excluded from job referrals, particularly those to the Bechtel Power Company's Fermi job site. As set forth in this brief, *supra*, the District Court's and the Sixth Circuit's findings that the referral list was "non-exclusive" is based on evidence in the record that union *members* are not excluded from obtaining their own jobs from in-town contractors. However, letters of requests from contractors and introductory cards were required. The record does not show that the referral system was available to non-union employees. Moreover, with respect to out-of-town contractors the referral system was operated, *de facto*, especially with regard to Bechtel Power Company so that the union had complete control over members sent to Bechtel.

There exists a triable issue as to whether the referral system was exclusive and/or as to whether the respondent's activities with respect to job referrals, whether the system was exclusive or not, rose to the level of "discipline."

Alternatively, even if the retaliation for intra union political activity alleged by petitioner is found not to constitute "discipline", it is respectfully submitted that it should remain actionable under Section 102 as an "infringement" of petitioner's rights under Section 101(a)(2) of the LMRDA based upon principles of notice pleading and petitioner's invocation of jurisdiction under Section 102 and the LMRDA.

—o—

CONCLUSION

Petitioner Breininger respectfully requests that this Court reverse the Sixth Circuit's decision filed March 1, 1988, in all regards and remand this cause for further proceedings on the merits to the United States District Court for the Northern District of Ohio, Western Division.

Respectfully submitted,

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BRIEF FOR THE RESPONDENT UNION

The citations to the opinion below, the basis for this Court's jurisdiction, and the statutory provisions involved are correctly set forth in petitioner's brief, at pp. 1-4, with the exception that petitioner fails to set out as one of the statutory provisions involved § 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158 (b)(2), which reads as follows:

> It shall be an unfair labor practice for a labor organization or its agents—. . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

Respondent Sheet Metal International Association, Local No. 6 ("the Union") operates a referral system for employees who wish to obtain work with employers who are members of two employer associations. Joint Appendix ("Jt. App.") 54-58. The collective bargaining agreement between the Union and two employer associations provides that the Union will refer employees upon request by employers, but does not specify precisely how the employees referred are to be selected. Jt. App. 29.

The district court described the general operation of the referral system as follows:

> [The] Union does not maintain an exclusive hiring hall system. There are several options available to members through which one may secure employment. First, a member may have his name placed on the out-of-work list maintained by [the Union] at the Union hall. Second, a member may have his name placed on a separate list authorizing the defendant to refer him for work under the Specialty

> Agreement, a separate collective bargaining agreement negotiated to cover work on siding, decking, and metal buildings. Third, a member may solicit employment on his own, in addition to being signed up on the referral lists. . . .
>
> When an employer contacts the Union for workers, and does not request workers by name, the Union begins at the top of the list and attempts to telephone each member in the order they appear on the list. . . . An employer may request for referral specific employees by name. . . . Members have the right to either accept or refuse a job referral. [Pet. App. A5-A6.]

Lynn L. Breininger, the plaintiff in this case (and petitioner in this Court) is a member of the Union and has been a member since the 1950's. R28, at p. 19. Breininger was therefore familiar with the Union's job referral system, including the fact that he was free to obtain jobs on his own. At no time did Breininger sign the out of work list for the specialty agreement. Jt. App. 58; R28, at p. 46.

In this lawsuit, petitioner contests the manner in which the Union operated its referral system; specifically, he maintains that he was not sent to a job for which he was specifically requested (R28, at 56-66); that he was not referred to jobs, including a specialty job, in the order in which his name appeared on the general out of work list (R. 26); that the contractual requirement that job requests be confirmed in writing was not uniformly complied with (Jt. App. 29; R. 26); and that some, but not all, of the employees who were referred to jobs to which petitioner believes he should have been referred were, unlike him, members of a group that backed the union administration (although one of the employees referred ahead of petitioner was the very individual who petitioner had backed for union office against the present administration). Jt. App. 18-19; R28, at 175-176. The Union maintained, in contrast, that its referral procedures had been properly followed. Jt. App. 57-58.

Petitioner's first amended complaint alleges two causes of action: The first, invoking §§ 1, 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 158(b), and 159, contends that the Union breached a duty of fair representation owed to petitioner by "refusing to honor employer requests for plaintiff's employment, . . . refusing to properly administer the job seniority list, and . . . refusing to process or acknowledge [petitioner's internal union] charges." Pet. App. A20. The second count claims that "in making job referrals, the defendant has favored a fraction of members . . . who have been known to support . . . the present business manager" and that by so doing, the Union has "otherwise disciplined" petitioner in violation of §§ 101(a)(5) and 609 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401(a)(5) and 529. Pet. App. A21.

The district court granted summary judgment for the Union on jurisdictional grounds, holding that since "discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA," jurisdiction over petitioner's complaint was properly in the National Labor Relations Board, not the courts. Jt. App. A9-A10.

In a brief *per curiam* opinion the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of the NLRA claim on the basis relied upon by the district court. As to the LMRDA cause of action, the Sixth Circuit also affirmed the dismissal, but on the separate ground that petitioner did not demonstrate that he was "otherwise disciplined" within the meaning of the statute:

> The term "discipline" was meant to refer only to punitive actions diminishing *membership* rights." *Finnegan v. Leu*, 456 U.S. 431. . . . Hiring hall referrals are not a function of union membership . . . . [Pet. App. A3.]

SUMMARY OF ARGUMENT

I. Petitioner's first cause of action, for breach of the duty of fair representation, alleges that the Union operated its job referral system "arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause" (Pet. App. A20), but *not* that the Union acted upon any union-related basis. This cause of action can survive only if: (1) the NLRA makes maladministration of union job referral systems, even though discrimination based upon union activity or lack thereof is neither alleged nor proved, an actionable wrong; and, in addition, (2) such a claim is actionable in the courts rather than before the National Labor Relations Board.

(a) As to the first proposition, §§ 8(b)(1)(A) and 8(b)(2) of the NLRA, added to the Act in the 1947 Taft-Hartley amendments, establish norms of behavior for unions with regard to the operation of job referral systems. Before the Taft-Hartley Act, the Wagner Act, in § 8(3) resolved this question by permitting unions to enter into contracts requiring that all employees be hired through a union referral system open only to union members. The question whether such closed shop arrangements should be allowed to continue, a major issue when the Taft-Hartley amendments were before Congress, was resolved by forbidding the closed shop, along with any other means of making union membership a condition of initial hire, in § 8(a)(3) of the Act, as amended, and by adding to the Act a new section, § 8(b)(2), prohibiting unions from causing or attempting to cause any employer to violate § 8(a)(3).

Section 8(a)(3) has always been understood as forbidding only employer discrimination in hire that is *motivated* by an intention to discriminate on a union-related basis. The legislative history of § 8(b)(2), and of the more general provision, § 8(a)(1)(A), show that Congress' intent with regard to those sections as applied to hiring questions was to parallel the prohibitions applicable to employers, and thus to forbid only discrimination based upon union-related criteria, and not any other form of maladministration of a union job referral system.

The NLRB has had many occasions to address the reach of § 8(b) in this regard, and has often failed to recognize the limitations Congress intended to place on the unfair labor practices governing union referral systems. In *Local 357 Teamsters v. NLRB*, 365 U.S. 667 (1961), this Court struck down an early version of NLRB regulation of union hiring hall arrangements, holding: "Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go further and establish a broader, more pervasive regulatory scheme." *Id.* at 676. In more recent years, the Board has nonetheless continued, in our view, to violate the Congress' express intent by viewing the Act as regulating such matters as whether union referral systems operate by objective criteria or conform to contractual requirements. The legislative materials, and this Court's opinion in *Local 357 Teamsters*, demonstrates that these Board rulings are wrong, and that the NLRA regulates unions when making job referrals in precisely the same way as the Act regulates employers when hiring on their own; no more and no less. That being so, petitioner's first cause of action here must be dismissed.

(b) Whether the proposition established in the previous section is correct or not, it is at least the case that claims alleging maladministration of union hiring halls should be decided in the first instance by the NLRB, the agency to which Congress committed the enforcement of the NLRA, and not by the lower courts. This Court has expressly so held, in general terms, in *Local 160, United Association v. Borden*, 373 U.S. 690 (1963), and in other cases; the only question in this case is whether the fact that *Borden* and its progeny involved state rather than federal causes of action limits the generality of their language.

There is no basis for so concluding. Rather, as a general matter, under current law the implication of new private causes of action is limited to situations in which

there is an *affirmative* indication that Congress so intended, particularly in situations in which Congress has provided *some* remedies for breach of a statute. This Court's NLRA duty of fair representation cases have created an exception to this principle for particular reasons. *Vaca v. Sipes*, 386 U.S. 171 (1967). None of those reasons apply to causes of action concerning union job referral systems, whether those causes of action are denominated breaches of the duty of fair representation or some other name. Moreover, as a substantive matter, there is no more basis for permitting the courts to imply a substantive cause of action regarding union referral systems that goes beyond the express unfair labor practices that Congress created than there is to allow the Board to do so. Consequently, no judicial cause of action for breach of the duty of fair reprecentation with regard to the operation of union job referral systems should be recognized.

II. (a) There is also a controlling precedent in this Court on petitioner's separate LMRDA course of action: *Finnegan v. Leu*, 456 U.S. 431 (1982) held that "otherwise discipline" within the meaning of §§ 101(a)(5) and 609 of the LMRDA pertains only to "retaliatory actions that affect a union member's rights or status *as a member* of the union" (*id.* at 437). The term does not reach union retaliatory actions generally, nor specifically, those—such as access to a union job referral system—that are not an "incident of union membership." *Id.* Petitioner and his *amici curiae* attempt to limit the generality of this Court's plain language, arguing that to so read the statute would undermine the Act's substantive protections of free speech. But the main office of the "otherwise discipline" language is to describe those circumstances in which procedural protections in connection with the enforcement of otherwise proper union rules are required; there are other remedies available where the union rules are substantively invalid.

(b) There is a second reason why union job referral decisions, discriminatory or otherwise, do not constitute "discipline" within the meaning of the LMRDA.

Union discipline is analogous to the criminal law, and as such is distinguished from other forms of harm caused by union actions by the fact that there is a moral judgment made by the union community as a whole that the disciplined member has violated a rule of behavior promulgated for the good of the group. The language of § 101(a)(5) suggests the criminal law analogy, as do several of the better reasoned cases and commentaries on the term "discipline" under the LMRDA. And this approach yields sensible results, distinguishing situations in which a union, for example, is simply administering a job referral system according to selection criteria, and situations in which ostracism from a job referral system is part of the sentence imposed after a member is found guilty of violating a norm of behavior imposed by the union as an entity. Where, as here, the allegation is that union officials have abused their power for their own benefit in a way detrimental to a member, the essential attributes of "discipline" are absent, and the procedural protections of the Act do not apply (although, of course, if substantive rights protected by § 101 of the Act are denied, there may be a cause of action, not pursued in this case, for that denial).

ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION ISSUE

The plaintiff in this case (petitioner in this Court) seeks to maintain a cause of action against the Union "pursuant to [the National Labor Relations Act ("NLRA")], 29 U.S.C. §§ 151, 158(b), and 159" for "refusing to honor employer requests for plaintiff's employment, . . . refusing to properly administer the job seniority list, and . . . refusing to process and or acknowledge his [internal union] charges." Pet. App. A16, A20.[1] In this regard, petitioner does *not* allege that the

[1] The last allegation—concerning the Union's supposed refusal to process an internal complaint—does not state a good NLRA cause of action for reasons quite different from those discussed in the text with regard to the allegations concerning the administration of the job referral system. As Judge Tamm has explained:

Union's actions were premised upon petitioner's union-related activities or lack thereof. Rather, petitioner alleges for purposes of this cause of action only that the Union, in administering its job referral system, acted "arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause." Pet. App. A20.

The two interlinked questions raised by this aspect of the complaint are, *first*, whether an employee who claims that a union has violated the NLRA in administering a job referral system must allege (and prove) that the union action complained of was premised on that employee's union-related activities or lack thereof; and, *second*, whether such an NLRA claim may be brought in district court, or must be filed with the National Labor Relations Board ("NLRB") through the processes Congress expressly provided for enforcement of the NLRA's unfair labor practice provisions.[2]

Arising as it does out of a union's privilege under § 9(a) of the NLRA to serve as the employee's exclusive representative, the duty of fair representation is coextensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them at all—namely, 'rates of pay, wages, hours . . . or other conditions of employment.' In other words, *the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure.* [*Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983) (emphasis added)]

Because we regard this reasoning as dispositive, we do not further discuss in the text the question whether an employee's dispute with his union concerning the handling of an internal union charge, standing alone, gives rise to a suit for breach of a union's duty of fair representation.

[2] It is worthy of note in this regard that the second count of the complaint—which invokes the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA"), not the NLRA—alleges that petitioner was not referred to jobs because of his political opposition to the Union's leadership. Pet. App. A21. It thus appears that in his NLRA count petitioner could have alleged

The burden of the argument that follows is that in enacting the 1947 Taft-Hartley amendments to the NLRA, Congress expressly considered these questions and struck the balance: so that only adverse union action in administering a job referral system that is premised on union-related activity or the lack thereof is prohibited by the Act; *and* so that claims that a union has violated the NLRA's norms in administering a job referral system are to be addressed to the Labor Board in the first instance through the administrative processes established in § 10 of the Act. From 1935 on, the Act had regulated *employer* hiring decisions and by 1947 it was settled law that the NLRA only prohibits adverse employer hiring decisions based on union considerations and that all claims that such an employer unfair labor practice had been committed are to be filed with the NLRB and not in the lower courts. The 1947 Congress' intent was to impose *exactly the same requirement* on unions that take an active part in the hiring process.

Given the general rules governing the judiciary's limited authority to supplement or alter such Congressional determinations, the petitioner's attempt to transmute his unfair labor practice claim into an implied judicial cause of action must be rejected.

A. The Substantive NLRA Rules Governing Union Job Referral Systems

"Discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA." *Farmer v. United Brotherhood of Car-*

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that his claim had a nexus to union-related activity and chose not to do so.

To be sure, had he pleaded his NLRA cause of action in that way, petitioner would have been alleging in terms a core NLRA § 8(b)(2 violation, nothing more or less. *See* pp. 9-19, *infra*. And, as this Court noted last term, "Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." *Communications Workers v. Beck*, —— U.S. ——, 108 S.Ct. 2641, 2647 (1988).

penters, 430 U.S. 290, 303, n.11 (1977).[3] Indeed, as we now show, in large part § 8(b)(2)'s office is to delineate the appropriate role of unions in serving as a clearing house for employees seeking employment. That section, in conjunction with the more general provisions of § 8(b)(1)(A), has been understood since the enactment of the 1947 Taft-Hartley amendments to the 1935 Wagner Act to establish norms governing union administration of job referral systems. Moreover, from the outset, a central issue has been whether Congress intended to go further in regulating union referral systems than banning refusals to refer on the basis of the union membership or union activities of the employee seeking referrals.

1. As this Court has noted, union hiring halls and job referral systems took hold in response to the needs of employers and employees generated by the special economic circumstances obtaining in certain industries:

> The hiring hall . . . . has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment." [*Local 357 Teamsters v. NLRB*, 365 U.S. 667, 672-73 (1961) (footnote omitted).]

See generally Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 Lab. L.J. 505 (1958); *NLRB v. International Association of Heat and Frost Insulators*, 261 F.2d 347, 350 (1st Cir. 1958).[4]

[3] As here pertinent, § 8(b)(1)(A) makes it an unfair labor practice "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7 of this title;" and § 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section." Section 8(a)(3), in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . ."

[4] For present purposes, the essential attribute of a union job referral system or hiring hall is that a union, in addition to negotiating rules governing the *employer's* management of the work place and policing those rules, provides a service similar to that provided by an employment agency, by matching out-of-work employees with job opportunities. A union may do so entirely on its own, expecting that employers will turn to the union as a source of employment referrals simply because the employers need, and know that the union is able to supply, workers. Or the union can seek in its collective bargaining agreement some understanding with the employers pertinent to the job referral system, such as that the union will be notified of all job opportunities and have an opportunity to offer candidates for employment (whom the employer may accept or reject), or that the employer will seek all, or a specified percentage, of its employees from the union-operated referral system.

The NLRB has sought to classify union job referral systems into "exclusive" and "nonexclusive" systems, and has maintained that the legality of certain union practices in operating the referral system may turn on that dichotomy. *See, e.g., Pile Drivers, Dock, Wharf and Bridge Carpenters and Drivers, Local Union 2396*, 287 N.L.R.B. No. 78 (1987); *International Union of Operating Engineers Local 406*, 262 N.L.R.B. 50 (1982), *enforced International Union of Operating Engineers, Local 406 v. NLRB*, 701 F.2d 504 (1983); *Teamsters Local 17 (Universal Studios)*, 251 N.L.R.B. 1248 (1980); *Journeymen Pipe Fitters Local No. 392*, 252 N.L.R.B. 417, 421 (1980), *enf. denied Journeymen Pipe Fitters Local 392 v. NLRB*, 712 F.2d 225 (6th Cir. 1983); *Local Union No. 174, Teamsters*, 226 N.L.R.B. 690, 699-700 (1976); *Buffalo Typographical Union No. 9 (Buffalo Courier Express)*, 202 N.L.R.B. 156 (1973).

Our central position—that the NLRA regulates union practices that affect hiring only to the same limited degree, and under the same principles, that pertain to employer hiring decisions—applies equally to all union referral systems. There are, however, two caveats.

First, because the pivotal question under § 8(b)(2) is whether the union "caused or attempted to cause" an employer to violate § 8(a)(3), it should be the case that where the union referral relationship with an employer is *nonexclusive*, the circumstances in which a union could be said to "cause" an employer not to hire a given individual are limited. *See, e.g., United Brotherhood of Carpenters, Local Union No. 1016 (Bertram Construction Co.)*, 272 N.L.R.B. 539, 543 (1984); *Hoisting and Portable Engineers, Local No. 4 (The Carlson Corp.)*, 189 N.L.R.B. 366, 366 (1971). The Board has maintained, however, that in the nonexclusive hiring hall context § 8(b)(1)(A) nonetheless forbids some forms of

In the period before the enactment of the Taft-Hartley Act, moreover, the unions in these industries typically

limited access to their hiring halls to union members. Fenton, *supra*, 9 Lab. L.J. at 506; *see* S. Rep. No. 1827, 81st Cong., 2d Sess. (1950) at 6-7 (explaining why hiring halls in the maritime industry provide stability of employment and limit corruption, but noting that before the enactment of the Taft-Hartley Act, hiring halls provisions ordinarily "oblige[d] the employer to give preference in employment to union membership.") The NLRA as originally enacted—the Wagner Act—did *not* prohibit this union membership limitation; under that Act, unions and employers could negotiate in their

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union discrimination but not others. *Compare, Chauffeur's Local 928*, 172 N.L.R.B. 2137 (1968) *with Buffalo Typographical Union No. 9*, 202 N.L.R.B. 256 (1973). At the same time the Board has declined to hold that where, as here, there is a nonexclusive job referral system, the union commits an unfair labor practice by declining to make a referral on a ground entirely unrelated to union activity. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 14-15. Thus to find for petitioner on the judicial duty of fair representation cause of action stated in this case would go beyond the rulings of the Agency assigned by Congress to administer the NLRA rather than leaving the question of whether that extention should occur to that Agency in the first instance. *See* Part I B of the argument, *infra*.

Second, where there is an exclusive hiring hall, or where the collective bargaining agreement specifies in some manner how the union is to make job referrals or how the employer is to use the referral system, there will be instances in which an employee's claim regarding the referral system concerns whether the contractual terms were complied with, rather than whether the operation of the system violates a public law norm stated in the NLRA. When that is the case, the principles that otherwise control the adjudication of contract-based disputes will of course govern. Thus, as to such contract-based disputes judicial relief is available, except that an employee must exhaust any applicable contractual grievance-arbitration system unless he or she attempts to do so and is thwarted by a breach of the duty of fair representation by the union. *Smith v. Evening News Assoc.*, 371 U.S. 195 (1962); *Republic Steel Corp. v. Maddox*, 378 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967). (In that instance, however, any breach of the duty of fair representation claim that would have to be proven would involve the union's conduct in prosecuting the employee's grievance concerning the referral system, not the union's conduct, if any, in administering the referral system.)

collective bargaining agreements for a "closed shop," *viz.*, for a system in which only union members could be hired. *See Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-11 (1949); *Colgate Co. v. Labor Board*, 338 U.S. 355, 381-83 (1949).

Whether closed shop agreements generally, and closed shop hiring hall arrangements particularly, should be prohibited became a major issue during the consideration of the 1947 Taft-Hartley amendments to the Wagner Act. *See generally* S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess. (1947) at 6, National Labor Relations Board, I Legislative History of the Labor Management Relations Act of 1947 (1985) ("Leg. Hist.") at 412; I Leg. Hist. 741 (remarks of Rep. Robison); *id.* at 1010 (remarks of Sen. Taft); *id.* at 1420 (remarks of Sen. Taft); *id.* at 1421 (remarks of Sen. Taft). Congress decided that central, and contentious matter in controversy by adding a second proviso to § 8(3) of the Wagner Act (which was incorporated into what became § 8(a)(3) of the NLRA, as amended) and by enacting an entirely new section, § 8(b)(2).[5]

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[5] The 1947 Congress also added § 8(b)(1)(A) to the Act. That section, as noted previously (*see* n.3, *supra*) makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of rights guaranteed in section 7." This prohibition, this Court has held, referring to the Act's legislative history, prevents

> "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1)." [Citation omitted] *It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.* [*International Ladies' Garment Workers' Union v. NLRB, ("Bernhard-Altmann")* 366 U.S. 731, 738 (1961) (emphasis added).]

Indeed, its history indicates that § 8(b)(1)(A) was intended to be, if anything, narrower than § 8(a)(1). *See* II Leg. Hist. 1138-39 (floor agreement to remove "interfere" from § 8(b)(1) although that term appears in § 8(a)(1)).

Since as we note below (n.6, *infra*) § 8(a)(1) adds nothing to § 8(a)(3) with respect to which hiring and firing decision violate

2. The second proviso to § 8(a)(3) and § 8(b)(2)—which are at the heart of this case—refer to and depend on § 8(a)(3)'s prohibition of certain employer unfair labor practices. We therefore briefly review the relevant § 8(a)(3) law.

Both before and after the Taft-Hartley amendments, the primary operative language of what is now § 8(a)(3) has made it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." From the outset, it has been understood that the NLRA "permit[s] a discharge for any reason other than union activity or agitation for collective bargaining." *Associated Press v. Labor Board*, 301 U.S. 103, 132 (1937). *See also NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 45 (1937); H. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess., at 19 (1935). In other words, the NLRA forbids only employer hiring and firing decisions detrimental to an employee that are "*motivated by antiunion animus.*" *Metropolitan Life Ins. Co. v. NLRB*, 460 U.S. 693, 700 (1983) (emphasis added).[6] As this Court explained in *NLRB v. Brown*, 380 U.S. 278, 286 (1965):

> Under [§ 8(a)(3)] both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary. See *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1. We have determined that the "real motive" of the employer in an alleged § 8(a)(3) violation is decisive. *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132; if any doubt still persisted, we laid it to rest in *Radio Officers Union v. National Labor Relations Board*, *supra*, where we reviewed the legislative history of the provision and concluded that Congress clearly intended the employer's purpose in discriminating to be controlling. See also *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. [263, 275-76]; *American Shipbuilding Co. v. NLRB*, [380 U.S. 300, 311]; *Local 357 Teamsters v. National Labor Relations Board*, 365 U.S. 667, 674-76.[7]

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the NLRA the same must be true with respect to the relationship between §§ 8(b)(2) and 8(b)(1). We therefore concentrate in the text upon § 8(b)(2) alone.

[6] Section 8(a)(1), similarly, has been understood to require proof of an employer's "hostile motive" to make out a violation at least in situations in which the conduct—such as hiring or firing employees—is, on its face, an ordinary incident of the employment relationship and does not have a necessary destructive effect on rights protected by the Act. *See NLRB v. Brown*, 380 U.S. 278, 286 (1965). *See also, e.g., American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 308-310 (1965); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1963). Thus, as far as we are aware, where the question is whether an unfair labor practice was committed in the selection of employees, §§ 8(a)(3) and 8(a)(1) have always been treated as *synonymous*. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[7] Of course, under § 8(a)(3), *direct* evidence of an improper intent is not required; such an intent may be inferred from circumstantial evidence. *Cf. American Shipbuilding Co. v. NLRB*, *supra*, 380 U.S. at 311-12 ("where many have broken a shop rule but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."). One species of such circumstantial evidence might be, for example, that an employer has offered an explanation for the failure to hire a union activist that proves pretextual. *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

It is true as well that in some instances, an employer may discriminate on a ground that, *by definition*, distinguishes between applicants for hire on the basis of a union-related criteria; where that is the case, the requisite intent is necessarily established, and the only issue to be decided is whether there is sufficient justification for the intentionally discriminatory conduct. *E.g., Radio Officers Union*, *supra*, 347 U.S. at 44-48 (1954) (paying higher wages to members than to nonmembers); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-32 (1963) (disfavored treatment of striking employees); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34-35 (1967) (same); *Metropolitan Edison Co. v. NLRB*, *supra*, 460

The 1947 Congress in amending the NLRA to add specified union unfair labor practices began from these well settled rules regarding *employer* unfair labor practices.

3. The Wagner Act proviso to § 8(3) carved out a broad exception to the basic prohibition stated there, permitting "encouragement" of union membership in the form of an employer agreement with a bona fide labor organization making union membership a condition of employment. The Taft-Hartley amendment to that proviso as here pertinent, however, *forbids* employers to make union membership a condition of *initial hire*, but *permits* the "*union shop*": *viz.*, an agreement specifying that once hired, the employee can be required to join the union "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later." [8] Congress thus eliminated that aspect of "the closed shop which requires *preexisting* union membership as a condition of employment", in order to eliminate that "barrier to free employment." S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947), I Leg. Hist. at 412-13 (emphasis added). The

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U.S. at 701-05 (special discipline imposed upon union activists). And this is true even if the employer contends that his *reason* for intentionally discriminating on the basis of union activity or lack thereof was not to encourage or discourage the union activity. *E.g., Radio Officers Union, supra*, 347 U.S. at 37 (fact that the "employer acted from self-interest [satisfying the demands of the union at the lowest possible cost] and not to encourage unionism" does not justify higher pay for union members); *Erie Resistor Corp., supra*, 373 U.S. at 225 (fact that the employer's "purpose in granting super-seniority [to non-strikers] was to keep its plant open" rather than to penalize strikers does not disprove the requisite § 8(a)(3) intent).

[8] A concomitant provision in the Taft-Hartley amendments to § 8(a)(3) specifies that although an employee may be required to "join" the union once employed, he or she cannot be required to adhere to union membership rules on pain of losing employment; only the requirement to pay union dues can be enforced through loss of employment. *See Radio Officers Union, supra*, 347 U.S. at 41; *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1964).

overall purpose of this aspect of the union shop amendments was more fully to implement the Act's "policy . . . to insulate employees' jobs from their organizational rights" (*Radio Officers Union v. NLRB, supra*, 347 U.S. at 40), by entirely removing the employee's exercise or nonexercise of organizational rights as a permissible ground for an initial refusal to hire.

Section 8(b)(2) of the Taft Hartley amendments, in turn, began life as the exact parallel of the new § 8(a)(3) proviso: In the bills that passed both the House and the Senate, the section that became § 8(b)(2) provided only for a prohibition upon union activity seeking to bring about employer discrimination *under a union security clause* against individuals denied membership, or terminated from membership, in a union for reasons other than nonpayment of dues, or on a discriminatory basis. *See* I Leg. Hist. 181 (H.R. 3020 as passed House, § 8(c)(7)); I Leg. Hist. 239-40 (H.R. 3020, as passed Senate, § 8(b)(2)). *See also* H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. (1947), I Leg. Hist. 323; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1974), I Leg. Hist. 427 ("Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment."); II Leg. Hist. 1012 (remarks of Sen. Taft) ("it is made an unfair labor practice for a union to try to get an employer to discharge a man *who has been improperly fired from the union*" (emphasis supplied)).

Going into the House-Senate conference on the 1947 labor legislation, then, both bills provided *in terms* for a prohibition on union activity designed to bring about adverse employment action against an employee *only where that activity was based upon union membership or lack thereof.*

In conference, one major change was made in the language of what became § 8(b)(2): the phrase "to discriminate against an employee in violation of sub-

section (a)(3)" was added.[9] Senator Taft explained the reason for this change in his report to the Senate on the Conference:

> The House managers . . . directed the attention of the Senate conferees to the fact that while the Senate bill forbade unions to discriminate against employees with respect of [sic] whom membership in labor organization had been denied on some ground other than failure to pay dues and initiation fees it did not expressly forbid a union to attempt to bring about the discharge of an employee who is not covered by a valid compulsory membership agreement. *Of course a discharge under such circumstances has been repeatedly held to be a violation of subsection 8(3) of the present act by the Board*, and since it was not the intent of the Senate to make unlawful coercion by a labor organization against employees covered by compulsory membership agreements and yet to tolerate attempts at discrimination against employee [sic] not so covered, the conferees agreed to the adoption of the phrase "in violation of subsection 8(3). [II Leg. Hist. 1539-40 (remarks of Sen. Taft) (emphasis supplied)].[10]

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[9] In addition, the language of the Senate bill was changed so that, to violate § 8(b)(2), a labor organization must not simply "persuade or attempt to persuade" an employee to discriminate against an employee, but rather must "cause or attempt to cause" the discrimination. The reason for that change was that a ban on persuasion "seemed inconsistent with the provisions guaranteeing all parties freedom of expression." II Leg. Hist. 1539 (remarks of Sen. Taft summarizing the actions taken in conference).

[10] The House Conference Report makes essentially the same point:

> Section 8(b)(2) is expanded so as to prohibit all attempts by a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of section 8(a)(3). The latter section . . . prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract. This provision contained in the conference agreement would, for example, prevent a labor organization from seeking to compel an employer to hire only union foremen or to discharge foremen who were not members of the union, and in this respect it covers matters which, among others, were dealt with under section 12 of the House bill. [I Leg. Hist. 548.]

The first of these sentences simply follows § 8(b)(2)'s words. The second confirms the understanding of § 8(a)(3) stated in the text at pp. 14-16 *supra*. The meaning of the last sentence of this commentary is however quite obscure: The Act, of course, generally protects employees, not supervisors, from adverse employer action (*see* §§ 2(2) and (11)), and it is not apparent in what respect the new § 8(a)(3) reference overlapped with any aspect of § 12 of the House bill, since the latter dealt only with "unlawful concerted activity" such as use of force or violence and certain kinds of picketing and strikes. *See* I Leg. Hist. 204-07 (H.R. 3020 as passed House, § 12). The most that can be said of this explanation is that it certainly does not suggest that the addition of the reference to § 8(a)(3) was intended to expand the office of § 8(b)(2) in any major way from where matters stood before conference.

Thus, § 8(b)(2) in its final form continued the two critical substantive characteristics of both the Senate and House versions of that section:

First, § 8(b)(2), *in the clearest possible terms*, imposes a prohibition on unions in taking an active role in hiring or firing decisions that is *parallel* to the prohibition placed upon employers by § 8(a)(3) of the Act. To repeat, the operative language of that provision here is "It shall be an unfair labor practice for a labor organization or its agents— . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ."

Second, since, as we have seen, § 8(a)(3) is limited to adverse employer action "intended to prejudice the employees' position because of their membership in the union" (*NLRB v. Brown*, *supra*, 380 U.S. at 286), it follows that § 8(b)(2) as well is limited to union discrimination based upon union-related activity.

4. The legislative materials, we submit, make it perfectly clear that the NLRA, while making hiring decisions based on union considerations unlawful, does not go so far as to make other forms of discriminatory or

arbitrary hiring decisions that adversely affect an employee an unfair labor practice. But the NLRB, in its administration of the Act, has never recognized that clear truth. We therefore believe it is incumbent on us to digress by tracing the evolution of the Board law.

(a) Immediately after the passage of the Taft Hartley Act, the first series of issues raised under the new § 8(b)(1)(A) and (2) prohibitions concerned the impact of those sections on union job referred systems. *See*, National Labor Relations Board, *Fourteenth Annual Report* at 80-83 (1949); *NLRB v. National Maritime Union*, 175 F.2d 686 (2nd Cir. 1949). At that juncture, the NLRB, and the courts, generally concluded that employer use of union-operated referral systems is valid, as is union enforcement of a requirement for such use, as long as the referral system is open to both union and nonunion employees. "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members." *Del E. Webb Const. Co. v. NLRB*, 196 F.2d 811, 845 (8th Cir. 1952). *See also Hunkin-Conkey Constr. Co.*, 95 NLRB 433, 435 (1951); *NLRB v. Swinerton & Walberg Co.*, 202 F.2d 511 (9th Cir. 1953); *Eichleay Corp. v. NLRB*, 206 F.2d 799 (9th Cir. 1953).

In 1958, however, the Board "departed from earlier rulings" and sought to "establish a broader, more pervasive regulatory scheme." *Local 357 Teamsters, supra*, 365 U.S. at 676. In *Mountain Pacific Chapter AGC*, 119 NLRB 883, *enf. denied, NLRB v. Associated General Contractors*, 270 F.2d 425 (9th Cir. 1959)), the Board held that a union job referral system can violate the Act even though there is no proof that referrals through the system are based in any way on union-related criteria. The Board's theory in *Mountain Pacific* was that simply by determining which employees are to be hired, "the arrangement displays and enhances the Union's power and control over the employment status," 119 NLRB at 896:

> Employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. . . . [T]he inference of encouragement of union membership is inescapable. [*Id.*]

Based upon this view, the Board sought to eliminate the potential for "arbitrary" union conduct by imposing requirements upon unions and employers other than the straightforward nondiscrimination on the basis of union activity requirement that § 8(a)(3) of the Act had long been held to establish.

This Court, in *Local 357 Teamsters, supra*, squarely *rejected* this effort by the Board to add to Congress' limited regulation of union job referral systems. In so doing, the Court relied heavily on the fundamental propositions about the reach of § 8(b)(2) outlined above: that the section goes no farther in regulating union activity with respect to hiring than § 8(a)(3) goes in regulating employer hiring decisions, and that as to both unions and employers, Congress intended to regulate the hiring process only to the degree of proscribing reliance upon union-based criteria in determining who should be employed:

> The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. . . . It is the "true purpose" or "real motive" in hiring or firing that constitutes the test. [365 U.S. at 674-75 *quoting Radio Officers Union, supra*, 347 U.S. at 43 (footnote omitted).] [11]

To impose criteria for the operation of union referral systems that do *not* turn on any demonstrated discrimination on the basis of union activity, the Court went on, improperly usurps the decisionmaking role delegated to the Congress:

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[11] The Court went on to note, as we noted earlier, that while an intent to discriminate is a requisite element of the unfair labor practices established by § 8(a)(3) and § 8(b)(2), that intent can be proven circumstantially as well as directly. *See* 365 U.S. at 675.

> [W]here Congress had adopted a selective system for dealing with evils, the Board is confined to that system. *National Labor Relations Board v. Drivers, etc. Local Union*, 362 U.S. 274, 284-90. *Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board canot go farther and establish a broader, more pervasive regulatory scheme.* [*Local 357 Teamsters, supra*, 365 U.S. at 676 (emphasis supplied).]

(b) Despite this apparently clear pronouncement by this Court regarding the limited degree to which Congress intended to regulate union job referral systems through the NLRA, the Labor Board has continued in the multitude of hiring hall cases the Agency has decided since *Local 357 Teamsters* to read § 8(b)(2) (and § 8(b)(1)(A)) as proscribing union behavior in selecting employees for jobs which, if engaged in directly by the affected employer, would *not* violate the Act.

For example, in a series of rulings that seem to revive the third of the *Mountain Pacific* criteria (that the union must publish objective referral rules) rejected by this Court, the Board has held in several cases that an exclusive union hiring hall must distribute job opportunities on an announced, objective basis.[12] Yet, as we have seen, there is no parallel NLRB doctrine holding subjective employer hiring practices, without more, violative of the Act; rather, § 8(a)(3) "permit[s] a discharge for any reason other than union activity or agitation for collective bargaining." *Associated Press v. Labor Board, supra*, 301 U.S. at 132.[13]

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[12] *Journeymen Pipe Fitters Local No. 392, supra*, 252 NLRB at 421; *Local Union No. 174, Teamsters, supra*, 226 NLRB at 699-700.

[13] This is not to say, of course, that an employer who hires on an entirely subjective basis will not have a harder time rebutting a union activist's claim that he or she was not hired because of union activity than an employer who can point to objective requirements, tests, or application procedures as the reason for denial of a job. But in that instance, the relevance of the subjective character of the hiring process is purely evidentiary; the Board does not, as it does in the union hiring hall case, purport to condemn subjective processes as violative of the NLRA, without more.

Similarly, the Board has maintained that a union which does have announced standards for conducting its job referral system, or which has agreed to such standards in a collective bargaining agreement, violates the NLRA by deviating from those standards, without regard to whether that deviation was motivated by the union sentiments of the employee affected or, instead, was simply a mistake, a change in policy, or the union's interpretation of its own rules, with which the Board disagrees.[14] The theory underlying these cases is that "By wielding its power arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies ... The natural consequence of referral preferences is to encourage membership. *NLRB v. Ironworkers, supra*, 600 F.2d at 777.[15]

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[14] *See, e.g., International Association of Heat and Frost Insulators Local 22*, 212 NLRB 913 (1974); *International Union of Operating Engineers Local 406, supra*; *NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers*, 600 F.2d 771, 776-77 (9th Cir. 1979); *Journeymen Pipefitters Local No. 392, supra*, 252 NLRB at 418; *Cell-Crete Corp.*, 288 NLRB No. 32 (1988).

[15] The Board cases do not simply hold that deviation from established referral criteria gives rise to an evidentiary presumption that the referral decision was based on union-related criteria, shifting the burden to the union to come forward with a legitimate, nondiscriminatory explanation of its behavior. *Compare, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Rather, the Board's hiring hall cases hold that the departure from established criteria is itself an unfair labor practice, unless justified not merely by legitimate criteria, but by proof that "the action was *necessary* to the effective performance of [the union's] performance of its function of representing its constituency." *Journeymen Pipe Fitters Local No. 392, supra*, 252 N.L.R.B. at 418 (emphasis supplied). *See also* n.13 *supra*.

While the Ninth Circuit has approved this general approach (*Ironworkers, supra*), other courts have either rejected the approach, or have expressed doubts as to its validity. *Glaziers Local Union 558 v. NLRB*, 787 F.2d 1406, 1412-14 (10th Cir. 1986); *Journeymen Pipe Fitters, supra*; *NLRB v. New York Typographical Union*, 632 F.2d 171, 180-81 (2d Cir. 1980); *cf. NLRB v. Local*

This rationale is nothing but a reiteration of the Board's *Mountain Pacific* theory *rejected* by this Court in *Local 357 Teamsters, supra. See* 119 NLRB at 896, quoted pp. 20-21, *supra.* And today, as in 1957, this rationale conflicts with both premises of § 8(b)(2) as Congress wrote that provision:

First, contrary to Congress' intent, the Board's present approach does *not* parallel the approach taken in employer hiring and firing cases. All sorts of employer conduct—most obviously, the discharge of union activists on an arbitrary basis rather than a union activity related basis—may have the *effect* of discouraging union membership, but such conduct is *not* an unfair labor practice. The Board has never placed upon employers the burden placed upon the union of defending, for example, a failure to hire a union activist by proving that the hiring decisions was "necessary to the effective performance of the [employer's] function." To the contrary, "[i]t has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects." *Local 357 Teamsters, supra*, 365 U.S. at 679 (Harlan, J., concurring).

Second, and equally to the point, the Board's present regulation of union hiring halls disregards the principle that under § 8(b)(2), as under § 8(a)(3), "[i]t is the 'true purpose' or 'real motive' . . . that constitutes the test" (*Local 357 Teamsters, supra*, 365 U.S. at 675), and, therefore, "a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of a violation of the statute" (*id.* at 679 (Harlan, J., concurring).[16]

294, International Brotherhood of Teamsters, 317 F.2d 746, 748, 749, 751 (2d Cir. 1963).

[16] The recent NLRB cases concerning regulation of union referral systems have drawn their reasoning in part from *Miranda*

(c) For present purposes, the import of the NLRB's enforcement of § 8(b)(2) and, derivatively, § 8(b)(1)(A), since their enactment is two fold:

Fuel Co., 140 NLRB 181 (1962), *enforcement denied*, 362 F.2d 172 (2d Cir. 1963). (*Miranda Fuel*, though not a hiring hall case, was decided on remand for reconsideration in light of *Local 357, Teamsters, supra.*)

The Board decided in *Miranda Fuel, first*, that § 7 of the NLRA "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" (140 NLRB at 185), even though § 7 in terms directs itself only to the right to engage in concerted activity of various kinds, or to refuse to do so and says nothing about the representative's conduct. The Board thereupon concluded that § 8(b)(1)(A)'s prohibition on conduct which "restrain[s] or coerce[s] employees in the exercise of the rights protected by section 7" somehow "prohibits labor organizations from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." *Id.* Since unions, in administering hiring halls are acting independently rather than representing employees in policing the employer's actions, this aspect of *Miranda Fuel*, as applied to hiring halls, plainly contravenes the principle that § 8(b)(1)(A) is no broader than § 8(a)(1).

Second, and even more to the point for present purposes (since § 8(b)(2), as we have seen, directly covers union job referral issues, and § 8(b)(1)(A) does so only derivatively), *Miranda Fuel* revisited the territory covered by *Local 357 Teamsters, supra*, regarding the scope of § 8(b)(2). As to that section, the Board concluded once again, reiterating its basic reasoning in *Mountain Pacific, supra*, that "union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's hiring status," so that proof of such an effect, without more, permits the Board to regulate the referral system closely, by evaluating the legitimacy of the criteria used by the union in running the system both generally and in particular instances; this is true, said the Board, even when "the moving consideration does not involve the specific union membership or activities of the affected employee." 140 NLRB at 187-88.

Both these lines of reasoning have been incorporated in the Board's hiring hall cases, and, as thus applied, both are inconsistent with the basic statutory analysis presented above.

This Court has, on several occasions, declined to review on the merits the validity of the NLRB's *Miranda Fuel* decision as a general matter. *Humphrey v. Moore*, 375 U.S. 335, 344 (1964); *Vaca v. Sipes, supra*, 386 U.S. at 186; *DelCostello v. Teamsters*, 462

First, § 8(b)(2), as the analog of § 8(a)(3)—and, perhaps more importantly, as the provision Congress crafted to enforce against unions the proscription upon making union membership a condition of hire—is directed at the precise question whether and to what degree unions may play an independent role in the hiring process, and has been so understood from the outset.

Second, the history of the enforcement of those sections in the union job referral context has been marked by a tendency by the Board to expand the regulation of union referral systems beyond that contemplated by Congress, as evidenced by the usual legislative materials, the statutory language, and its history. Those materials indicate that Congress intended in the NLRA to regulate union referral systems no more closely and no more loosely than the NLRA regulates employer hiring decisions when made directly by the employer.

* * * *

The sum of the matter is this: the 1947 Congress in enacting the Taft-Hartley Act went so far as to prohibit adverse union hiring decisions premised on an employee's union-related activities or lack thereof; Congress did *not* go further and enact a prohibition on arbitrary or discriminatory union hiring decisions *not* based on the employee's union activities. Thus, the substance of petitioner's NLRA count in this case does not state a good cause of action under the statute Congress wrote.

B. The NLRA Procedures For Enforcing The Statutory Norms Governing Union Job Referral Systems

Whether we are right or wrong in the foregoing analysis (and in our criticisms of the Labor Board's hiring hall decisions) that discussion certainly suffices to illustrate, once again, that "[t]he problems inherent in the operation of union hiring halls are difficult and complex." *Local 100, United Association v. Borden*, 373 U.S. 690, 694 (1963). Indeed, as we have seen, the proper resolution of these problems under the NLRA requires a sensitive reading of the legislative materials that takes into account the role of union job referral systems in their industrial context, and the needs of employers and unions in developing an efficient means of matching competent employees to job opportunities.

As a general matter, of course, precisely because of the subtle nature of both the applicable legal principles and of the practical needs of the labor relations system, the enforcement of the NLRA is committed to a *single* administrative agency in the first instance, and not to the numerous state and lower federal courts. *San Diego Unions v. Garmon*, 359 U.S. 236, 245 (1959); *Garner v. Teamsters*, 346 U.S. 485 (1953).[17] And this Court has heretofore uniformly understood this to be true with regard to cases alleged discriminatory union job referral systems:

> Whether a hiring hall practice is discriminatory and therefore violative of federal law is a determination Congress has entrusted to the Board. See *Team-*

U.S. 151, 170 (1983). For reasons stated in the text (pp. 27-41, *infra*) there is no reason in this case to undertake that task now, even as limited to hiring hall issues.

[17] There is one express statutory exception to this rule: Congress has explicitly provided for a judicial cause of action with respect to violations of a single subsection of § 8(b) of the NLRA, § 8(b)(4), prohibiting certain forms of union secondary activity (§ 303, 29 U.S.C. § 187). In addition, the statute empowers the Labor Board to bring suits by injunctions under specified circumstances, pending the adjudication of unfair labor proceedings before the Board (§§ 10(j) and (l), 29 U.S.C. §§ 160(j) and (l)), and for review in the courts of appeals of the decisions rendered by the Board in unfair labor practice cases (§ 10(f), 29 U.S.C. § 160(f)).

Garmon, and most of its progeny have, of course, involved jurisdiction over state, not federal, causes of action. The rationale of the *Garmon* doctrine, however, is not one of substantive supersession of state law, but one that rests upon the primary jurisdiction of the NLRB. 359 U.S. at 244-45. For that reason, the *Garmon* principle applies as a general matter to attempts to imply from the NLRA judicial causes of action for enforcement of the Act's express prohibitions. *Communications Workers v. Beck, supra*, 108 S.Ct. at 2647.

> *sters v. NLRB*, 365 U.S. 667 (1961). [*Farmer, supra*, 430 U.S. at 304 n.12.]

See also International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 239 (1971) ("review of alleged union discrimination . . . in job referrals . . . is a matter within the exclusive competence of the NLRB" where the case concerns "the legality of conduct under the National Labor Relations Act"); *Local 100, United Association v. Borden, supra* 373 U.S. at 694 (that "[t]he problems inherent in the operation of union hiring halls are difficult and complex," (citing Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements*, 48 Va. L. Rev. 871) "point[s] up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency" and makes "the conduct on which [such a] suit is centered . . . conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.")

The essential procedural question with regard to petitioner's NLRA cause of action for arbitrary union job referral practices is therefore whether there are, despite these previous pronouncements by this Court, circumstances in which such a claim may be litigated in a federal district court in the first instance rather than before the NLRB. Relying principally upon *Vaca v. Sipes*, 386 U.S. 171 (1967), petitioner maintains that he may so proceed; in a nutshell, petitioner contends that he has stated a cause of action properly characterized as one for a breach of the Union's duty of fair representation, and, that being so, he may, without more, have that cause of action adjudicated in a federal district court.

In analyzing that contention, we begin from the point that the judicial cause of action for breach of the duty of fair representation is *not* one that appears in terms in the NLRA but rather is an implied cause of action. And thus far, "all of the cases this Court has . . . considered [concerning the duty of fair representation have]

involved the union's exercise of its exclusive power over the processing of grievances (including the conduct of arbitration hearings), *e.g. Vaca v. Sipes, supra; Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Bowen v. Postal Service*, 459 U.S. 212 (1983), or the negotiation of the terms of employment in collective bargaining agreements, *e.g. Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988)." Brief of the Association for Union Democracy et al. as *Amici Curiae*, at 14.

What petitioner seeks, then, is to extend this Court's prior jurisprudence creating an implied judicial cause of action for breach of the duty of fair representation to union conduct in administering job referral systems.

1. Given the nature of the duty of fair representation cause of action, we turn at this point to a review of the principles that generally govern the implication of judicial causes of action under statutes providing a detailed enforcement scheme for their norms of behavior.

Whether a private individual may bring a case in court, either for injunctive relief or for damages, to enforce a statutory standard of conduct when Congress has not expressly provided any such judicial cause of action is one which arises with great frequency. In recent years, the Court's "approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change." *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1982):

> When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). Under this approach, federal courts, following a common-law tradition, re-

garded the denial of a remedy as the exception rather than the rule. . . .

In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action. In *Cort v. Ash*, 422 U.S. 66 (1975), the Court . . . outlined criteria that primarily focused on the intent of Congress in enacting the statute under review. The increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required. Our cases subsequent to *Cort v. Ash* have plainly stated that our focus must be on "the intent of Congress." [456 U.S. at 374, 377.]

And, the post-*Cort v. Ash* cases were summarized just a few months ago in a case also involving an asserted private cause of action for a breach of a duty of fair representation:

[Whether] a cause of action to enforce a Union's duty of fair representation should be implied . . . . poses an issue of statutory construction: The "ultimate issue is whether Congress intended to create a private cause of action." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (citations omitted; see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). Unless such "congressional intent can be inferred from the language of the statute, the statutory structure, or from some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 174, — (1988). It is also an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). In such cases, "[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. Sea Clam-*

mers, 453 U.S. 1, 15 (1981); see also *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 93 (1981). [*Karahalios v. National Federation of Federal Employees*, —— U.S. ——, 109 S.Ct. 1282, 1286 (1989).] [18]

Thus, the current general rule is that it is proper to imply a judicial remedy where Congress has provided none *only* if there is some *affirmative* indication that Congress did indeed intend judicial enforcement; in making that determination, the more complex the statutory enforcement scheme, the less likely it is that the courts will assume that Congress intended an unexpressed judicial role. *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

2. The judicial cause of action for breach of the duty of fair representation is an implied private cause of action not simply in one sense but in *two* senses:

First, the *substantive* principle upon which that duty is based does *not* appear in terms anywhere in the NLRA; rather, the principle was first implied by this Court from the overall structure of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), and then imported by analogy into the National Labor Relations Act. *Vaca v. Sipes*, *supra*, 386 U.S. at 177.

Second, as we have noted, and not surprisingly, while the NLRA, in limited circumstances, expressly provides for adjudication of its substantive prohibitions in court, as opposed to before the Labor Board, the Act states *no* judicial cause of action for a breach of the duty of fair representation; again, the implication of such a private judicial cause of action began with cases decided under the RLA and was then carried over into cases in which

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[18] *Karahalios* concerned the question whether, by analogy to the NLRA, a judicial cause of action could be implied for breach of the duty of fair representation from the Federal Labor Relations Act.

the parties were subject to the NLRA. *Syres v. Oil Workers*, 350 U.S. 892 (1955).[19]

So far as we are aware, the duty of fair representation cause of action is unique in federal jurisprudence in implying *both* a substantive rule *and* a judicial remedy. It is therefore helpful in understanding the current law and in evaluating how the law should be further elaborated to understand the path of development thus far.

(a) *Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944) is the RLA case in which this Court first addressed *both* the substantive principle that became known as the duty of fair representation (*id.* at 193-94) ("whether the Railway Labor Act . . . imposes on a labor organization acting by the authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination") *and* the availability of a judicial cause of action to enforce that duty (*id.* at 194) ("if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.")

The Court in *Steele* first answered the substantive question in the affirmative:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. . . . Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . . but it has also imposed on the representative a corresponding duty. We hold that

[19] While the substantive and procedural aspects of the duty of fair representation are interrelated, this Court made clear in *Karahalios* that the two are not inextricably linked; Congress is free to choose to relegate adjudication of a union's duties with respect to representation of employees entirely to an administrative body. 109 S.Ct. at 1287.

> the language of the Act . . . read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [323 U.S. at 202-03.]

Turning then to the procedural issue, the Court (applying the now-abandoned *Rigsby* approach), viewed the suit for breach of the duty that had been found implicit in the statute as cognizable in court "*unless* the Railway Labor Act itself has excluded petitioner's claims from judicial consideration." 323 U.S. at 204 (emphasis supplied). The *Steele* opinion thereupon proceeded to survey the various administrative mechanisms set up under the RLA, and to conclude that those mechanisms were *not* designed to handle any of the myriad possible "disputes between employees and their representative." *Id.* at 205. The Court concluded that "[*i*]*n the absence of any available administrative remedy*, the right here asserted . . . is of judicial cognizance" (*id.* at 207 (emphasis supplied)), adding (again applying the now-outmoded *Rigsby* reasoning):

> That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . . The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has protected by . . . injunction . . . and like it is one for which there is no available administrative remedy. [323 U.S. at 207.]

See also Tunstall v. Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); *Railroad Trainmen v. Howard*, 343 U.S. 768, 774 (1952) (again stressing that there must be a judicial remedy because there is "no adequate administrative remedy" under the RLA).[20]

[20] In his dissent in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), Justice Powell explained that the private cause of ac-

(b) This Court was not faced with a case squarely presenting the issue whether the implied private remedy aspect of *Steele* applies under the NLRA until *Syres v. Oil Workers, supra.*[21] Like *Steele*, *Syres* involved a situ-

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tion rulings of *Steele* and its progeny were due in large part to the *RLA's* particular history and structure:

> For almost 50 years after *Rigsby*, this Court recognized an implied private cause of action in only one . . . statutory context [other than that involved in *Rigsby*.] Four decisions held that various provisions of the Railway Labor Act of 1926 could be enforced in federal court. The case for implication of judicial remedies was especially strong with respect to this Act, as Congress had repealed its predecessor . . . after [this Court] . . . had held that judicial enforcement of its terms was not available. Convinced that Congress had meant to accomplish more through the 1926 Act, and faced with the absence of an express administrative or judicial enforcement mechanism, the Court in *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930), upheld an injunction enforcing the Act's prohibition of employer interference in employees' organizational activities. Buttressed by 1934 amendments to the Act that indicated congressional approval of this step, the Court in *Virginian R. Co. v. Railway Employees*, 300 U.S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steele* . . . and *Tunstall*. . . the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts. [441 U.S. at 733-34 (Powell, J., dissenting).]

[21] *Wallace v. Labor Board*, 323 U.S. 248, 255 (1948), decided the same day as *Steele*, recognizes that in negotiating agreements under the NLRA, unions may not discriminate against groups of employees *on the basis of their union membership. Id.* at 242-43.

Wallace arose before the Taft-Hartley amendments added § 8(b) to the statute. Consequently, at the time *Wallace* was decided, the only relevant prohibition was in § 8(3) of the Act, forbidding *employer* discrimination in tenure of employment "to encourage or discourage membership in any labor organization," a prohibition well understood by the time of *Wallace* to "permit a discharge for any reason other than union activity or agitation for collective bargaining" (*Associated Press v. Labor Board, supra*, 301 U.S. at 132.) *Wallace* determined that a closed shop agreement with a union, otherwise legal under the Wagner Act until the 1947 amendments, did not insulate an employer from a charge under § 8(3)

ation in which black employees complained that in negotiating a collective bargaining agreement with their employer, their union sanctioned racial discrimination against them in derogation of an implied statutory obligation, this time under the NLRA, to "represent all members of the craft without discrimination as to color." 223 F.2d 739, 741 (5th Cir. 1955).[22]

The *Syres* court of appeals dismissed the fair representation claim for lack of jurisdiction.[23] The Court, in

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where the employer knew that the union intended to exclude from membership all employees who had been members of a rival union and then to seek their discharge. 323 U.S. at 256. Since *Wallace* came out of a Labor Board adjudication, the case did not raise any implied cause of action question.

Some years later, in *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953), this Court did address the substantive issue whether the NLRA imposes on bargaining representative during negotiations a general fair representation obligation, rather than one simply limited to a duty not to discriminate on the basis of union membership or lack thereof. The Court in *Huffman* observed that "the authority of bargaining representatives is not absolute" and includes an obligation to "make an honest effort to serve the interests of all those members, without hostility to any." 345 U.S. at 337.

Like *Wallace*, however, *Huffman* shed no light on the implied private cause of action question: *Huffman* arose, against the employer at least, under an entirely separate statute, the Selective Training and Service Act of 1940. And the question whether the claim against the union should properly have been pursued as an unfair labor practice rather than in court was avoided by the Court on the ground that the question had not been raised below and was unnecessary to decide since, on the merits, there had been no violation of the NLRA by the union. 345 U.S. at 332 n.4.

[22] In *Syres*, the complaining employees *were* union members who, therefore, could not complain of discrimination on the basis of union membership, but only of discrimination on the basis of race. 223 F. 2d at 740.

[23] The basis for the court of appeals ruling was *not* that the cause of action was one that had to be adjudicated before the Labor Board or not at all but, rather, that the case did not as a substantive matter involve a breach of *any* statutory duty, express or implied, since the plaintiffs were members of the union and were actually suing for breach of an understanding entered into between

a *per curiam* opinion that simply cited *Steele*, *Tunstall*, and *Howard*—and therefore did not do business with the fact that the NLRA, as amended, unlike the RLA, *does* provide both substantive norms and a remedial scheme to govern disputes between a union and the employees the union represents—reversed and remanded for a hearing on the merits. 350 U.S. 892.[24]

(c) Several years after *Syres* was decided, the Board held for the first time, in *Miranda Fuel*, *supra*, that § 8(b)(1)(A) includes by implication a duty of fair representation obligation upon unions identical to, and derived from, the duty this Court had implied previously under the RLA in *Steele*.[25] At that point, the question arose with particular force whether an implied judicial duty of fair representation cause of action could survive despite the fact that the NLRA, according to the Agency created to enforce the Act, provides an express administrative remedy for the same wrong.

The Court confronted that question in *Vaca v. Sipes*, *supra*. *Vaca* was a case of the kind now known as a "hybrid § 301/duty of fair representation" case; *viz.*, a case in which the plaintiff was alleging that an employer had breached a collective bargaining agreement with regard to him, and that he had not been able to pursue his contractual grievance successfully because

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themselves and their union regarding the position to be taken in negotiations. 223 F. 2d at 743.

[24] As we have seen, §§ 8(b)(1)(A) and 8(b)(2) had been added to the Act in 1947, to explicitly establish certain substantive standards of conduct for unions and to provide an administrative remedy, identical to that applicable to employer § 8(a) violations, for union § 8(b) violations.

[25] We note again that *Miranda Fuel*, *supra*, also decided, separately, that certain kinds of union actions—those with a direct impact on an employee's employment opportunities—violate § 8(b)(2); the § 8(b)(2) analysis in *Miranda*, upon which the later hiring hall cases predominantly rely, was not derived from this Court's duty of fair representation cases, but from the Board's independent reading (albeit in our view an erroneous one, *see* pp. 9-19, *supra*) of § 8(b)(2) itself.

the union had breached its duty of fair representation by the manner in which it pursued the grievance.

The *Vaca* Court began by stating "the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the national labor policy of concurrent judicial and administrative remedies." 386 U.S. at 180. And, the Court held that there must be an "exception" to the Board's exclusive jurisdiction in such hybrid cases for three reasons:

> [1] A primary justification for the preemption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation.
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> [2] The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. . . .
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> [3] [T]he courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. . . . What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? [386 U.S. at 180-81, 182-83, 187.] [26]

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[26] Last term, this Court, in *Communications Workers v. Beck*, *supra*, in a brief discussion, held that there was court jurisdiction over a duty of fair representation suit that involved not the administration of a collective bargaining agreement through the grievance/arbitration system but the negotiation of the agreement. 108 S. Ct. at 2647. While the Court in *Beck* did not discuss the

3. Not one of the three reasons this Court gave in *Vaca* for implying a private cause of action counsels for the same result here; the current jurisprudence regarding implication of private causes of action, moreover, clearly counsels against such an implication.

First, this is a case, unlike *Vaca*, in which "the need to avoid conflicting rules of law and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose" (386 U.S. at 181) are compelling. As we have seen, the Board has been in the process of explicating the implications of the 1947 Taft-Hartley amendments for the administration of union job referral systems since immediately after the amendments were passed, and has developed a complex set of rules applicable in various situations. Those rules were originally developed without any reference at all to the court-developed fair representation doctrine, and currently draw upon that doctrine only in small part. *See* pp. 20-25, *supra*. Thus, unlike the issues that arise in *Vaca* hybrid-type suits, union job referral issues *are* "matters . . . normally within the Board's unfair labor practice jurisdiction" (*id.* at 181), and the usual principles applicable under both *Garmon* and the recent implied cause of action cases counsel that such matters be considered in the first instance by the tribunal Congress specified.

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application of the factors relied upon in *Vaca* for creating an exception to the *Garmon* principle, we note that the duty of fair representation claim in *Beck* did share the most important factors that *Vaca* stressed as the reasons for permitting an implied cause of action despite the availability of an administrative remedy:

First, the principles applying to the permissible exaction of funds under union security clauses were developed by this Court, in cases deriving under the RLA and the Constitution, and not by the NLRB. *E.g., Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). And second, the *Beck* case was one in which constitutional issues parallel to the statutory questions were also raised, issues which, the Court stressed, are not ordinarily adjudicated by administrative agencies and in any event "would not fall within the Board's primary jurisdiction." 108 S. Ct. at 2647-48.

Second, the notion that duty of fair representation issues must be decided in court in order to assure access to a remedy free of the General Counsel's discretion as to instituting unfair labor practice complaints has less force here than in the *Vaca* context.[27] While it may not be "assume[d] from the NLRB's tardy assumption of jurisdiction in [grievance/arbitration duty of fair representation cases] that Congress, when it enacted . . . § 8(b) in 1947 intended to oust the courts of their traditional jurisdiction" (386 U.S. at 183), there was for the most part no such jurisdiction with regard to union hiring activities before 1947. The reason is that since the closed shop was valid prior to 1947, the statute expressly permitted unions to control hiring, arbitrarily or otherwise, through union security arrangements as combined with union admission policies. Thus, the degree to which the NLRA regulates union actions related to hiring issues was one that as a practical matter did not arise before the Taft-Hartley amendments, at which time Congress squarely relegated the decisions of those issues to the Board and the institution of the requisite unfair labor practice complaints to the General Counsel.

Third, and finally, the "intensely practical considerations" (386 U.S. at 182) similar to those that in *Vaca* counselled combining duty of fair representation adjudication concerning union handling of grievances in the

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[27] We note as well that of the three reasons given in *Vaca* for its jurisdictional conclusion, the concern about the Board's processes must carry the least weight. The General Counsel's discretion regarding the institution of unfair labor practice charges is an integral part of the procedure Congress created and applies to employee protections at least as central to the Act as the duty of fair representation; these include most notably for present purposes, the right not to be discriminated against in hire by employers for union-related reasons. Under present private cause of action doctrine, the fact that Congress provided a remedy that puts in place a screening entity would, if anything, counsel *against* implying a remedy that, instead, allowed free access to an adjudicatory tribunal without any prior determination of whether the case has merit and is substantial.

same judicial action with contract-based causes of action against employers pull in precisely the opposite direction here. Claims of *employer* discrimination in employment decisions, bottomed on the NLRA, are adjudicable before the NLRB or not at all. *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983); *Iron Workers v. Perko*, 373 U.S. 701 (1963). Where an employer knows or should have known of union conduct violating § 8(b)(2) in administering a job referral system, and acts on the basis of that conduct in making a hiring decision, the employer violates § 8(a)(3) and will be held by the Board jointly and severally liable for any back pay due to the injured employee. *Wolf Trap Foundation*, 287 N.L.R.B. No. 103 (1988).[28] In such cases, union culpability is a prerequisite to holding the employer liable, even if only the employer is charged. Thus, to permit hiring hall discrimination cases against unions to go forward in court would mean that two adjudicatory entities may have to determine the same facts and decide the same legal issues in case arising out of the same incident.

In short, this is a case in which this Court is "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. Sea Clammers*, *supra*, 453 U.S. at 15. Those remedies are the same whether it is an employer alone who is charged with violating the NLRA through discriminatory hiring practices, or whether it is the union that is charged, alone or in addition to the employer.

4. To this point we have, for the purposes of this procedural argument, indulged the supposition that it is permissible to imply from the overall structure of the

[28] Until the recent *Wolf Trap* decision, Board doctrine permitted employers to be held liable under § 8(a)(3) whenever a union referral was indeed based upon impermissible criteria, whether or not the employer was aware of the union's culpable conduct. *Lummus Co.*, 142 NLRB 517 (1963), *enf. in part, Lummus Co. v. NLRB*, 339 F.2d 728 (D.C. Cir. 1964).

NLRA, and from § 9 in particular, a duty of fair representation that applies to unions that are acting solely in a job referral capacity. The analysis in Part IA of our argument, *supra*, in fact, compels the conclusion that any such implication is unwarranted.

The 1947 Congress, in proscribing the closed shop, directly addressed the question of what limitations should be placed upon the union role in the hiring process and concluded that the limitations under the NLRA should, in a manner basically parallel to the rule applicable when an employer hires independently, proscribe union-related discrimination *only*. This Court thereupon concluded in *Local 357 Teamsters*, *supra*—in words we quoted above and are directly in point here—that: *"Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme."* 365 U.S. at 676 (emphasis supplied).

No reason appears why the courts are in any better position than the Agency to which Congress primarily committed the statute's interpretation to add to the particularized scheme Congress enacted in this particular regard.[29]

[29] It is no answer to suggest that the 1947 Congress enacted the Taft-Hartley amendments on the understanding that a judicial cause of action for breach of the duty of fair representation would be generally available, for any kind of union conduct including that specifically addressed in a narrow way by the 1947 amendments.

For one thing, it is historically inaccurate to suggest that the 1947 Congress had reason to believe that such a cause of action would be available at all under the NLRA. As noted, the first NLRA case raising the issue in any guise was *Huffman*, *supra*, which was decided in 1953. And, as developed in the text, there are sufficient structural differences between the RLA and the NLRA to make the carrying over to the NLRA of the implied cause of action created under the RLA far from a certainty.

Indeed, if Congress had in fact acted on the understanding that a judicial cause of action with respect to hiring hall discrimination was available, then its addition to § 8(b)(2) of the cross-reference to § 8(a)(3) was entirely unnecessary; on that supposition, there

II. THE LMRDA ISSUE

The second, distinct issue in this case is whether a failure to refer a union member to a job through a union job referral system open to members and nonmembers alike necessarily constitutes "discipline" within the meaning of §§ 101(a)(5) and 609 of the LMRDA.[30]

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would have been no need to "expressly forbid a union to attempt to bring about the discharge of an employee who is not covered by a valid compulsory membership agreement", or to worry about "toler-at[ing] attempts at discrimination against employee [sic] not . . . covered [by a union security clause]." II Leg. Hist. 1540 (remarks of Sen. Taft).

[30] Petitioner and his *amici curiae* seek to inject into this case a separate question: whether a failure to refer a union member for a job because of his or her opposition to the union leadership can infringe the rights of free speech protected by § 101(a)(2) of the LMRDA, 29 U.S.C. § 401(a)(2), and thereby give rise to a cause of action under § 102, 29 U.S.C. § 402. This issue, however, was, for three reasons, not appropriately raised, and is therefore not properly before this Court.

First, § 102 provides a cause of action for "[a]ny person whose rights secured by the provisions of this subchapter have been infringed." That section is, as this Court has stated, entirely "independent" of the provisions of the LMRDA that turn on whether or not "discipline" has been imposed, and requires that a specific "right secured" by the Act be invoked. *Finnegan v. Leu*, 456 U.S. 431, 439 (1982). In this instance, although § 102 was cited in the complaint as part of the heading of Count Two (App. A21), § 101(a)(2), the *substantive* section specifying the rights of free speech and assembly, was not even mentioned. Rather, the body of Count Two alleges violation *only* of § 101(a)(5) and § 609, the two sections which turn on whether there has been union "discipline"; § 101(a)(5), in particular, prohibits unions from imposing "discipline" without providing the safeguards specified, and that due process right is one of the "rights secured" by Title I of the LMRDA. Thus, the fair reading of the complaint is that the *only* substantive provisions of Title I upon which the action under § 102 is based is § 101(a)(5).

Second, consistent with the complaint, the *only* LMRDA issue *actually litigated* below was whether petitioner was "discipline[d]" within the meaning of §§ 101(a)(5) and 609. The question of infringement of the rights protected by § 101(a)(2) was never

Section 101(a)(5) provides that no member may be "fined, suspended, expelled, or otherwise disciplined" unless certain procedural protections—notice of the charges, a reasonable time to prepare a defense, and a full and fair hearing—are afforded. Section 609, in turn, makes it unlawful to "fine, suspend, expel, or otherwise discipline" a member for exercising his or her rights under the Act. And, in *Finnegan v. Leu*, 456 U.S. 431, 438 n.9 (1982), this Court indicated that the common phrase "fine, suspend, expel, or otherwise discipline" has the same meaning in both provisions.

Against this background, the term "discipline" must be ascribed a meaning that makes sense in both § 101(a)(5)

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raised, and never decided. *See* Pet. App. A, and B; Jt. App. 41-53, 59-67.

Third, the relevant "Question Presented" in this Court, again consistently with the complaint and the proceedings below, was "Whether a union's discriminatory refusal to refer its members to jobs constitutes discipline within the meaning of the [LMRDA]." Cert. Pet. (i).

This Court does not ordinarily decide issues not raised or decided below (*e.g. Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Kerr v. United States District Court*, 426 U.S. 394, 405 n.9 (1970)), nor will the Court address issues not "set forth in the petition [for certiorari] or fairly included therein" (Supreme Court Rule 21.1(a); *see also, e.g., Mayor v. Educational Equality League*, 415 U.S. 605, 623 (1974); *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971)).

Neither petitioner nor his *amici curiae* have suggested that there are any special circumstances here that counsel against application of these principles. *See* Brief of Petitioner on the Merits at 27; Brief for the United States as *Amicus Curiae* Supporting Petitioner at 24-26 (addressing the § 101(a)(2) issue on the merits while noting that the United States takes no position on whether the issue was "properly preserved in the lower courts", and recognizing that the Question Presented "may not encompass the [Section 101(a)(2)/102] issue"); Brief of the Association for Union Democracy et al. as *Amici Curiae*, at 6.

The question whether § 101(a)(2), as incorporated in § 102, would have provided petitioner with a cause of action had he chosen to so litigate his case is therefore one that is *not* presented and that this Court should *not* reach in this case.

and § 609. Since the first consequence of denominating a certain form of union action detrimental to an employee as "discipline" is that the procedures specified in the LMRDA must be followed before the decision can be made and implemented, the first consideration in construing the term "discipline" is whether the action is of a kind that Congress would, as a matter of policy, intend to surround with these procedural prerequisites.

Finnegan v. Leu, *supra*, draws the lesson from the statute, its structure and its history that "discipline," as used in the LMRDA, covers only union actions that affect a "member's rights or status *as a member* of the union." 456 U.S. at 437 (emphasis in original). A union refusal to refer an employee out of a hiring hall used both by members and non-members can not be brought within that meaning. *See* point A below. Moreover, as we show next, the term discipline in the LMRDA context is also limited to union actions taken to enforce the organization's norms and which are intended to signify the *union's* moral condemnation for the member's breach of those norms. Plainly, as a general matter, a union officer's decision—made on his own and not pursuant to any union rule—not to refer a political opponent to a job does not come within that concept of discipline. See point B below.

A. *Finnegan* presented the question of whether removal of a union member who is also a union employee from his union employment constitutes "discipline" within the meaning of § 609. If so a termination of a member-employee from his union position because of his exercise of speech rights generally protected by § 101(a)(2) would constitute a *per se* violation of § 609.[31]

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[31] *Finnegan*, as noted above (at n.30, *supra*), treated as an entirely separate question the issue of whether a member's free speech rights could be "infringed" within the meaning of § 102 of the Act by retaliatory actions that do *not* constitute "discipline" within the meaning of the statute. *Sheet Metal Workers v. Lynn*, —— U.S. ——, 109 S. Ct. 639 (1989), which held that removal of an elected union officer for advocating a particular position at a union meeting does violate the LMRDA, was premised entirely upon § 102 of the Act; the *Lynn* Court did *not* hold that removal of an elected union officer constitutes "discipline."

The *Finnegan* Court held that "otherwise discipline" refers *not* to all retaliatory or punitive actions taken against members, but *only* to those "retaliatory actions that affect a union member's rights or status *as a member* of the union"; *viz.*, those that "impinge upon incidents of union membership." 456 U.S. at 437 (emphasis in original)[32]

The Sixth Circuit in this case, relying on *Finnegan*, and following earlier Tenth and Eleventh Circuit decisions, held that where a union operates a hiring hall open to members and nonmembers alike, a denial of referrals does not, without more, deprive an employee who happens to be a union member of any "incident[] of union membership" and thus does not constitute § 101(a)(5) "discipline."[33]

The United States objects that *Finnegan* should be read, contrary to its plain language, as holding that whether union action is "discipline" turns upon a distinction between union action affecting the rights of rank-and file members and action affecting the rights of officers, rather than upon a more general rule separating union action affecting incidents of membership from other

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[32] That "otherwise disciplined" is a limited term is confirmed by reference to other sections of the statute, and to the legislative history. LMRDA § 401(e) assures each member "the right to vote for or otherwise support the candidate or candidates of his choice, *without being subject to penalty, discipline, or improper interference or reprisal of any kind.*" (Emphasis supplied). Similarly, an earlier version of the free speech provisions of the bill protected the rights to engage in free speech "without being subject to penalty, discipline or interference of any kind." National Labor Relations Board, II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* at 1102, 1119. Plainly, then, the framers of the legislation understood "discipline" to be a concept narrower than "penalties" or "reprisals" generally.

[33] *See, Turner v. Local Lodge #455 International Brotherhood of Boilermakers*, 755 F.2d 866 (11th Cir. 1985); *Hackenburg v. International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982).

kinds of union action. Brief for the United States as *Amicus Curiae*, *supra*, at 20-21. The Government's objection turns upon a supposed anomaly in "prohibit[ing] a union from expelling a member of the rank-and-file from a members only hiring hall for his political opposition to a union's leadership, but . . . permit[ting] the union to impose the same sanction for the same reason if the hiring hall includes some non-members." *Id.* at 21.

Looking at the federal labor statutes as a whole, however, there is no such anomaly. First of all, as we have seen (n. 4, *supra*), exclusive hiring halls may not be run on a "union members only" basis; thus the Government starts from a quite limited premise. Second, the case the Government posits would in any event constitute an NLRA § 8(b)(2) violation (and might constitute an LMRDA § 101(a)(2) violation). Sections 101(a)(5) and 609 are not catchalls; and there is no basis for ascribing to Congress the intent to stretch those sections far beyond their limited reach as authoritatively delimited by this Court in order to add an additional cause of action for unlikely cases.

The fact of the matter is that the term "discipline" in § 101(a)(5) is part of a provision which determines the circumstances in which *the procedural protections* stated there apply. Looked at in that way, the scope of that term cannot, as the Government argues, possibly depend on whether or not the "predictable effect [of the union action] is to punish or deter the exercise of rights protected by the Act." Brief for the United States at 23. For § 101(a)(5) proceeds on the premise that the *substantive* rule being enforced is valid, but that procedural protections are nonetheless required. Given that premise the Government's proposed definition of discipline which covers invalid as well as valid norms is hopelessly overbroad.

B. There is, in addition, quite a separate reason why union action of the kind involved in this case is not "discipline," a reason that would obtain whether the

right to use the union hiring hall were open to nonmembers or not.

"Discipline is the criminal law of union government." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 175, 178 (1960). That being so, the distinction between "discipline", subject to the procedural protections of § 101(a)(5) and other union actions should turn not on whether the union action is detrimental to the member in the sense that the action causes him *some* injury, economic or otherwise, but on whether the union action is one that, like the criminal law, carries with it a measure of moral condemnation by the community as a whole. *See generally* La Fave & Scott, *Criminal Law* (1972) at 11 (since both civil and criminal law may result in judgments equally detrimental to the defendant, "the only real basis for distinction between crimes and civil wrongs lies in the moral condemnation which the community visits upon the criminal"). In this instance, the relevant community is the union as an institution, and the relevant injury which distinguishes union "discipline" from other union action is the *particular* injury of stigma in, or symbolic ostracism from, the union community.

Section 101(a)(5), after all, speaks of "charges" and time to prepare a "defense," terms that are derived from criminal law concepts and therefore assume that the member is alleged to have violated some rule of *conduct* imposed by the *union as an entity*. *See Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 81 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961) ("any member against whom steps are taken *by the union in the interest of promoting the welfare of the group* is entitled to [the] guarantees [provided by § 101(a)(5)]" (emphasis supplied)); *Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976) (union action is "discipline" only when "it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership," citing and paraphrasing Etelson & Smith, *Union Discipline Under the*

Landrum-Griffin Act, 82 Harv. L. Rev. 727, 734 (1969)).[34]

This approach leads to results that accord both with practical sense and with the overall policies of the Act.

First, since § 101(a)(5) requires notice and a hearing to the adversely affected employee; "[i]t seems apparent, as a matter of statutory construction, if § [101(a)(5)] were construed to apply to removal of a person from, or addition of a person to, a referral list . . . the statute would require an empty ritual." *Turner v. Local Lodge #455 Boilermakers*, *supra*, 755 F.2d at 870; *see e.g. Macaulay v. Boston Typographical Union No. 13*, 692 F.2d 201, 204-05 (1st Cir. 1982) (employee reclassified as "not at the trade" because he did not report for work for two years, and therefore dropped from the priority list for jobs was not "disciplined" within the meaning of § 101(a)(5)). *Cf. Figueroa v. National Maritime Union*, 342 F.2d 400 (2d Cir. 1965).

Where the union is acting as the administrator of a job referral system for union and nonunion members alike, much as an employment agency might do, its function is to administer an allocation scheme, according to criteria that do not purport to pass any moral judgment by the union upon the member (or nonmember's) conduct. In that circumstance, under the "moral condemnation" approach just outlined there is no union "discipline," and the Act's prescribed procedures need not be followed.[35]

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[34] The United States quotes this same portion of *Miller v. Holden*, and the Etelson & Smith commentary, as if those authorities supported its position. Brief for the United States at 21, 23. But their point, as we understand it, is not that *any* action that "deter[s] the exercise of rights protected by the Act" (Brief for the United States at 23) is "discipline," but that only such actions having this effect as express the condemnation of the union as a whole for violation of a union-prescribed norm of behavior, are "discipline."

[35] Similarly, where the union, in administering the allocation scheme, does use denial of referrals as a means of enforcing a norm

Second, where, as here, the allegation is that officials of the union, to stifle their political opposition, retaliated against certain individuals, there is no sense in which the moral opprobrium of the *union as a whole* is being visited on the victims: No rule of conduct imposed by the union community, designed to protect the union as a whole, is involved, nor is any official condemnation in the name of the union pronounced. In such a case, the complaint covers an *abuse* of power by the officials *for their own ends* rather than a legitimate exercise of power "in the interest of promoting the welfare of the group" (*Detroy*, *supra*, 286 F.2d at 81). This abuse of power is no more "discipline" under § 101(a)(5) than similar retaliation against political opponents by public officials—even if substantively unlawful and actionable for that reason—is a criminal conviction, subject to the procedural requirement of, for example, the Sixth Amendment, or the Double Jeopardy Clause.[36]

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of behavior, but the norm is one imposed not by the union itself but by the union and the employer together in the collective bargaining agreement, there is no *union* discipline, *viz.*, no expression of moral opprobrium by the union as an entity; rather, the rule is typically one that relates to the efficiency of the workplace. *See Figueroa v. National Maritime Union*, *supra* (contract rule against hiring any employee known to have a narcotics violation); *Turner v. Local Lodge #455 Boilermakers*, *supra* (contract rule against wildcat strikes); *Hackenburg v. International Brotherhood of Boilermakers*, *supra* (same).

[36] On the other hand, if, upon the evidence, it appears that refusal to refer an individual to jobs by a union job referral system was indeed imposed as part of the sentence in what was otherwise a true disciplinary action in the sense just described, the disciplinary process *as a whole* would affect the disciplined individual "as a union member," since the entire point of such a process would be to judge his behavior as a member of the union community. In that case, the fact that the particular sentence imposed included a job referral penalty would not remove the protections of §§ 101(a)(5) and 609.

The case the United States regards as "most nearly on point" to this one (Brief for the United States, at 21-22), *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986), was actu-

Thus, the answer to the LMRDA question posed by the *certiorari* petition is that "refusal to refer [a union] member to jobs," "discriminatory" or otherwise, is *not*, in itself, "discipline." The ruling of the Court of Appeals with respect to the LMRDA question is therefore correct.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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ally a case of the kind described in this note, and not one analogous to the present case: According to the findings in that case, the job referral penalty was imposed after a conviction by the union as a whole for theft, and was therefore part of the disciplinary sentence (albeit one not imposed in the official proceeding itself).

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No. 88-124

In The

Supreme Court of the United States

October Term, 1988

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF THE CASE

Petitioner herewith incorporates the Statement of the Case contained in his original Brief on the Merits at pages 4-11 and will at this time not set forth any additional Statement of the Case.

REPLY ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION ISSUE

In its brief on the merits, the respondent Sheet Metal Workers International Association, Local Union No. 6, hereinafter (respondent Union) has devoted the initial portion of its argument at pp. 7-26 to an issue that is totally irrelevant to the questions before the Court. The unrelated issue sought to be interjected by the respondent Union is whether Section 8(b)(2) of the NLRA prohibits misconduct in the operation of a referral system other than discrimination based on membership in a union.

In Count I of his First Amended Complaint, Petitioner Breininger alleged that the respondent Union had breached its duty of fair representation by acting "arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause" in denying Petitioner job referrals. It is clear that in order for Petitioner to recover on his duty of fair representation claim, he need only establish that the union's activity violated its duty of fair representation. The duty of fair representation is a judicially-recognized duty emanating from the union's status as the exclusive bargaining representative. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 171 L.Ed.2d 842 (1967). Petitioner submits that it is irrelevant whether the respondent

Union's actions in this case also violated the specific terms of Section 8(b)(2) of the NLRA.

In his original brief on the Merits, petitioner Breininger contended in his Argument that a union member's claim that his union breached its duty of fair representation by engaging in discriminatory job referrals may be brought in Federal District Court in an action invoking the Court's jurisdiction under 28 U.S.C. Section 1337 based on allegations of the breach of duty of fair representation. Petitioner Breininger did not claim that he was entitled to recover relief in Federal District Court solely of an unfair labor practice. If the latter were the case, such a claim would be pre-empted by the exclusive jurisdiction of the NLRA, subject to judicial review. The precise issue raised by Petitioner in his Brief on the Merits at p. 13 *et seq.* arises from the fact that some conduct can be both an unfair labor practice *and* a breach of the duty of fair representation. That fact raises the issue of whether courts are precluded from determining whether a union has breached its duty of fair representation on the theory that the NLRB has primary jurisdiction to determine the legality of the conduct involved.

It is respectfully submitted that the validity of the NLRB's interpretation of Section 8(b)(2) of the NLRA is irrelevant to the outcome of this case. Petitioner's First Claim for Relief is based on an alleged breach of the duty of fair representation. In the within case, the respondent Union's alleged misconduct is also "arguably subject to" the NLRA, so that the claim would be pre-empted unless it is within an exception to the pre-emption rule contained in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). It is unnecessary for the Court to resolve

the issue of whether or not the alleged Union misconduct violates a specific section of the NLRA. See *Vaca v. Sipes*, 386 U.S. 171 at 186 (1967). Rather, the key question presented is whether Federal Courts retain their authority to award relief for a breach of the duty of fair representation even though the NLRB might also view the same conduct as a violation of the NLRA. It is respectfully submitted that the Federal Courts do retain their authority in such instances. See generally the argument presented in the Brief of Petitioner on the Merits at pp. 16-20.

In its brief on the merits, the respondent Union has, in further addressing the Duty of Fair Representation issue at pp. 26-41, contended that the availability of an action for a breach of the duty of fair representation should be decided by this Court by reference to recent cases that have considered whether to recognize implied causes of action for violation of other federal statutes. This argument would if accepted, require the Court to overrule well settled labor law principles that have been recently reaffirmed. The respondent Union urges that this Court's previous basis for recognizing the doctrine of fair representation is no longer available. The respondent Union cites various authorities which, it contends, leads to the conclusion that the duty of fair representation cannot extend beyond requiring the Union not to commit an unfair labor practice as defined in the NLRA. The Union also seems to reason by analogy that a union member's redress for the narrowed duty of fair representation is limited to the administrative remedies provided by the NLRA.

The respondent Union's rationale fails to take issue with this Court's most recent reaffirmation, this very

term, of its adherence to the reasoning of *Vaca v. Sipes*, while declining, under the authorities on which the Union relies, to recognize an analogous cause of action for federal employees under Title VII of the Civil Service Reform Act of 1978. See *Karahalios v. National Federation of Federal Employees Local 1263*, 109 S.Ct. 1282 (1989). In *Karahalios*, this Court explained how, consistent with its decision in that case, it could continue to recognize a judicial remedy for a breach of the duty of fair representation even after Congress had extended the Act to labor unions and the board had held that a breach of duty was an unfair labor practice as follows at 109 S.Ct. at 1287:

> To be sure, prior to *Vaca*, the NLRB had construed Sections 7 and 8(b) of the NLRA to impose a duty of fair representation on union bargaining agents and to make its breach an unfair labor practice. *** The issue in *Vaca*, some years later, was whether, in light of *Miranda Fuel Co.*, the courts still had jurisdiction to enforce the unions' duty. As we understood our inquiry, it was whether Congress, in enacting Section 8(b) in 1947 had intended to oust the courts of their role enforcing the duty of fair representation implied under the NLRA. We held that the "tardy assumption" of jurisdiction by the NLRB was insufficient reason to abandon our prior cases, such as *Syres*.

It appears that the Court views *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 655 S.Ct. 226, 89 L.Ed. 173 (1944), *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed.2d 842 (1967) and other cases in that line of authority to be consistent with *Karahalios* and the decisions on which *Karahalios* relied. Note also that in *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 655 S.Ct. 226, 89 L.Ed.2d 173 (1944), this Court noted that if the NLRA confers powers on the bargaining representative of

a craft on class of employees without any commensurate duty, constitutional questions arise. Moreover, there exists a continuing question whether the NLRB's jurisdiction extends to the full scope of the duty of fair representation. Therefore, it is submitted that the reasoning in *Karahalios, supra*, provides no basis for the overruling of *Vaca v. Sipes, supra*, and the cases on which it relied.

The respondent Union further contends that the duty of fair representation should be restricted to the negotiation of collective bargaining agreements and to the administration of grievances and not "extended" to the administration of job referral systems. However, just last term, this Court described the scope of the doctrine of fair representation in very broad terms. In *Communications Workers of America v. Beck*, 108 S.Ct. 2641, 2645, 2647 (1988), this Court stated (citations omitted):

> This broad authority [to act as an exclusive bargaining agent], however, is tempered by the union's "statutory obligation to serve the interests of all members without hostility or discrimination toward any," *** a duty that extends not only to the negotiation of the collective bargaining agreement itself but also to the subsequent enforcement of that agreement, including the administration of any grievance procedure the agreement may establish.
>
> ******
>
> Federal courts may resolve unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies," *** and one such remedy over which federal jurisdiction is well settled is the judicially implied duty of fair representation. *** This jurisdiction to adjudicate fair representation claims encompasses challenges leveled not only at a union's contract administration

> and enforcement efforts, * * * but at its negotiation activities as well.

It is respectfully submitted that the respondent Union's argument would require the Court to retreat not just from early decisions . . . like *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944) and *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955) which were decided prior to the Court's recent cases on implied rights of action, but also decisions from the last couple of terms, like *Communications Workers of America v. Beck*, 108 S. Ct. 261 (1988).

The suggestion made by the respondent Union is that the Court's duty of fair representation cases involved only the negotiation of contracts or the processing of grievances. *Beck* involved the issue of whether expenditures of dues collected from members of the unit for activities unrelated to collective bargaining, contract administration, or grievance adjustment violated the union's duty of fair representation on the objecting employees' First Amendment rights. *Communications Workers of America v. Beck, supra*, 108 S. Ct. at 2645. Nor is the rationale for the duty of fair representation limited to contract negotiation or grievance processing. In *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976), this Court stated:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interest of all employees in a bargaining unit," . . . the controlling statutes have long been interpreted as imposing upon the bargaining agent *a responsibility equal in scope to*

> *its authority*, "the responsibility and duty of fair representation."

Any attempt to limit the applicability of the duty of fair representation to fact situations involved in previous Supreme Court cases would be arbitrary and unfounded. Nor is the attempt of the respondent Union to limit the doctrine of fair representation to "hybrid" fair representation claims sound. See *Amalgamated Association of Street and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971). See also Brief of Petitioners on the Merits at pp. 22-23.

II. THE LMRDA ISSUE

In its brief, the respondent Union has chosen to ignore the primary basis of the ruling of the United States Court of Appeals for the Sixth Circuit that petitioner's LMRDA claims were pre-empted by the NLRB's exclusive jurisdiction over discriminatory job referrals. (See Appendix A, page A-2 of Appendix to Petition for Writ of Certiorari). In his Brief on the Merits at pp. 24-25, petitioner Breininger set forth his contention that the Sixth Circuit's pre-emption analysis with respect to Petitioner's claim brought pursuant to 29 U.S.C. Sections 411(a)(5), 412, and 529 (Labor Management Reporting and Disclosure Act). Petitioner's contentions in this regard have gone unanswered by the respondent Union.

The respondent Union has chosen to focus its argument on a contention that Count II of Petitioner's First Amended Complaint fails to state a claim on the merits. However, on the merits of petitioner's LMRDA claim, the Sixth Circuit's only holding was that petitioner's claim

was foreclosed by *Finnegan v. Leu*, 456 U.S. 431 (1982). It is respectfully submitted that in noting that petitioner's claim was foreclosed by *Finnegan v. Leu*, the Sixth Circuit went beyond the holding of the District Court, which merely held that petitioner's LMRDA claims were preempted by the NLRB's exclusive jurisdiction over discriminatory job referrals. Moreover, the Sixth Circuit's view of the Court's decision in *Finnegan v. Leu* was incorrect. Petitioner's LMRDA claim should not be dismissed on some other ground at this stage of the litigation since the lower courts have not made specific findings on what exactly the Union and/or its leadership did to petitioner and why. It is respectfully submitted that petitioner's First Amended Complaint adequately states a claim of "discipline" within the meaning of the LMRDA.

In its brief, the respondent Union contends that the term "discipline" for purposes of 29 U.S.C. Section 529 refers only to those actions for which procedural due process is required under 29 U.S.C. Section 411(a)(5). Even if the scope of the two sections is parallel, assuming *arguendo*, the respondent Union in its brief at page 46 urges an overly narrow interpretation of the term "discipline" when it urges that a union member is subject to discipline only when "the substantive rule being enforced is valid, but procedural protections are required." However, 29 U.S.C. Section 529 by its clear language prohibits imposing of discipline by any labor organization, or any officer, agent, shop steward, or other representative of a labor organization in retaliation for the exercise of a protected right. Legislative history, as set forth in the Brief of the Association for Union Democracy, Teamsters for a Democratic Union, and Public Citizen as Amici

Curiae at pp. 7-10 suggests an overriding concern with abuses by union leaders of powers they can exercise against union members. Given the legislative history, it is doubtful that Congress would have meant to deny a remedy for punishment meted out by means of a union leader's abuse of his position simply because he chose not to invoke formal union processes. Petitioner's First Amended Complaint refers to retaliation by the Union's leadership against petitioner by discriminating against him in the administration of a job referral system recognized in a contract between the Union and employers. The leadership had control over the system only by virtue of its position with the union. It is respectfully submitted that such an abuse of power is that which Congress intended to proscribe.

III. CONCLUSION

Petitioner Breininger respectfully requests that this Court reverse the Sixth Circuit's decision filed March 1, 1988, in all regards and remand this cause for further proceedings on the merits to the United States District Court for the Northern District of Ohio, Western Division.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

LYNN L. BREININGER, PETITIONER

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

1. Whether the National Labor Relations Act preempts federal court jurisdiction over a union member's claims that his union breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act by discriminating against him in job referrals.

2. Whether a union's alleged refusal to refer a member to jobs, as a result of his political opposition to the union's leadership, gives rise to a cause of action under Sections 101(a)(5), 102, and 609 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5), 412, and 529.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-124

LYNN L. BREININGER, PETITIONER

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case raises two questions in which the United States has an interest:

The first is whether the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, preempts federal court jurisdiction over claims that a union has breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act by discriminating against a union member in the administration of a job referral system. The NLRA empowers the National Labor Relations Board (NLRB or Board) to adjudicate unfair labor practice claims arising under Sections 7 and 8 of the Act, 29 U.S.C. 157, 158. Recognizing that the Board has primary responsibility for the interpretation and administration of that Act, this Court has held, subject to certain exceptions, that courts may not entertain claims based on activities arguably subject to Section 7 or Section

8 of the Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The Board has a strong interest in cases, like this one, that address the extent of its exclusive jurisdiction under the *Garmon* rule and that rule's exceptions.

This case also presents the question whether alleged discrimination against a union member by a union in the operation of a job referral system, in retaliation for the member's intra-union political activity, can give rise to a cause of action under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401 *et seq.* (LMRDA). As this Court has observed, the Act's "overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan* v. *Leu*, 456 U.S. 431, 441 (1982). The means Congress chose to further that objective included, in Title I of the Act, conferring certain rights on union members and providing a private right of action for violations of those rights and, in Title IV of the Act, establishing requirements for elections that are enforced by the Department of Labor. The provisions of the Act enforceable by the Department and those enforceable by union members complement one another in assuring that unions are democratically governed. Accordingly, the United States has an important interest in the interpretation of provisions of the Act, like those in issue in this case, that establish the rights of union members to participate freely in intra-union political activity.

In connection with the Court's consideration of the petition for a writ of certiorari, the Solicitor General was invited to and did file a brief expressing the views of the United States.

STATEMENT

1. Respondent Sheet Metal Workers Local Union No. 6 (the Union) represents sheet metal workers in a multi-

employer bargaining unit in the Toledo, Ohio, area. The Union has agreed in a collective agreement with two associations of employers to establish and administer a job referral system.[1] Under that system, when an employer asks the Union to provide particular individuals to work on a job, the Union attempts to honor the request (Pet. App. A6). However, if the employer does not request particular individuals or if the individuals requested are unavailable, the Union refers workers from an "out-of-work list" (*id.* at A5-A6). A sheet metal worker is not required to seek work exclusively through the out-of-work list, but rather may solicit employment directly from sheet metal contractors (*id.* at A5).

In this action, petitioner Breininger, a member of the Union, has alleged that the Union has refused to honor employer requests for his services and has unjustifiably passed him over in making referrals from the out-of-work list. Pet. App. A18-A20. According to the amended complaint, this alleged mistreatment gives rise to claims based on the Union's "duty of fair representation" (Pet. App. A18-A20) and on Sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C. 411(a)(5) and 529 (Pet. App. A21).

2. The district court granted summary judgment in favor of the Union, holding that all of petitioner's claims were within the exclusive jurisdiction of the NLRB. Pet.

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[1] Article V of the collective bargaining agreement provides in pertinent part (Pet. App. A5):

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. • • •

If the Union does not provide enough workers within 48 hours, an employer may fill the positions itself.

App. A4-A10. Invoking the general rule of preemption set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the district court concluded that "[t]he NLRB has exclusive jurisdiction over discrimination in hiring hall referrals." Pet. App. A9.

3. In a brief *per curiam* opinion, the court of appeals affirmed (Pet. App. A1-A3). That court concluded that "union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB" (Pet. App. A2). The court added that it was "of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of the LMRDA's bill of rights" (*ibid.*) and that petitioner could not prevail on his fair representation claim in any event because he had failed "to affirmatively allege that his *employer* breached the collective bargaining agreement" (*ibid.*).

The court of appeals also ruled that petitioner's LMRDA claim was insufficient on the merits, because petitioner did not demonstrate that he was improperly "disciplined" within the meaning of that Act (Pet. App. A3). Relying on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), the court stated that the LMRDA was "intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment." Pet. App. A3. Under the system at issue in this case, the court found, job referrals "are not a function of union membership since referrals are available to non-members as well as to members" (*ibid.*). The court concluded that discrimination in job referrals therefore could not be characterized as "discipline" within the meaning of the LMRDA. *Ibid.*

SUMMARY OF ARGUMENT

I. Decisions of this Court recognize a general rule that courts may not assume jurisdiction over claims based on activity that is arguably protected or prohibited by Sections 7 and 8 of the NLRA. See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). However, this general rule is subject to exceptions, two of which are in issue in this case: Even if the conduct involved might also be characterized as an unfair labor practice, this Court's decisions establish that courts are not prohibited from entertaining a claim that a union has (1) breached its duty of fair representation or (2) violated the LMRDA. *E.g.*, *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971). In this case, petitioner's amended complaint states colorable claims falling within each of these exceptions. The district court was therefore not precluded by *Garmon* and its progeny from adjudicating the merits of those claims.

II. The court of appeals also erred when it held, relying on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), that if a job referral system is open to both members and non-members of a union, discrimination by the union in the administration of the system cannot constitute "discipline" for purposes of Sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C. 411(a)(5), 529. In *Finnegan* v. *Leu*, this Court held that a newly elected union president did not "discipline" the union's business agents, within the meaning of Section 609, when he discharged them in order to appoint replacements loyal to him. In that context, the Court drew a distinction between benefits extended to the union's rank-and-file, the withdrawal of which could constitute "discipline" under the Act, and benefits extended only to certain

union officials or employees, the withdrawal of which was held not to be "discipline." That analysis is not dispositive of the question whether the withdrawal of a benefit extended to all members of the rank-and-file falls outside the Act's definition of "discipline" simply because that benefit is also enjoyed by some non-members. The language, purpose, and legislative history of Section 609 support an interpretation of the term "discipline" that would make that section applicable to discrimination in the administration of a job referral system when the discrimination is intended to punish a union member for engaging in protected intra-union political activity.

Even if that type of discrimination were not "discipline," it should be held to "infringe" the complaining union member's rights within the meaning of Section 102 of the LMRDA, 29 U.S.C. 412. Earlier this Term, in *Sheet Metal Workers' International Ass'n* v. *Lynn*, 109 S. Ct. 639, 644 (1989), this Court made clear that whether action taken by a union against one of its members "infringes" the member's rights under the LMRDA within the meaning of Section 102 must be "judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." Discrimination against a union member in a job referral system, in retaliation for the member's engaging in protected intra-union political activity, is inimical to that "basic objective," whether or not participation in the system is limited to members of the union.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER PETITIONER'S CLAIMS THAT THE UNION BREACHED ITS DUTY OF FAIR REPRESENTATION AND VIOLATED THE LMRDA

In the NLRA, "Congress * * * entrusted administration of the labor policy for the Nation" to the NLRB, "a centralized administrative agency, armed with its own procedures and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242. To ensure the integrity of that scheme, the Court has recognized a general rule that the Board has exclusive jurisdiction of activity "arguably subject" to the Act (*id.* at 245):

> When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *.

The Court has reaffirmed that general rule on many occasions.[2]

As both lower courts found, petitioner's fair representation and LMRDA claims fall within the scope of *Garmon*'s general rule. Petitioner has alleged that the Union denied him referrals because of his intra-union political activity. Such discriminatory conduct would at least arguably violate Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), which prohibits a union both from restraining or coercing employees in the exercise of their rights to

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[2] *E.g.*, *Local 100, United Ass'n* v. *Borden*, 373 U.S. 690, 697 (1963); *Iron Workers* v. *Perko*, 373 U.S. 701, 705 (1963); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 302 (1971); *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 305 (1977).

engage in union activity and from breaching its duty of fair representation.[3]

However, *Garmon*'s general rule is not absolute. Courts may entertain certain categories of cases as to which "it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca* v. *Sipes*, 386 U.S. 171, 179 (1967). See *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 296-297 (1977). The causes of action set forth in petitioner's complaint—which are based on alleged breaches of the Union's duty of fair representation and alleged violations of petitioner's right to free speech under the LMRDA—are among those that a court may properly adjudicate.

A. *The Fair Representation Claim*

In *Vaca* v. *Sipes*, 386 U.S. at 188, the Court held that a state court had jurisdiction over a claim that a union had breached its duty of fair representation by failing to exhaust contractual grievance procedures on behalf of an employee who had been discharged. The Court explained (*ibid.*):

> [T]he unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the *Garmon* pre-emption doctrine inapplicable.

[3] *Local 100, United Ass'n of Journeymen* v. *Borden*, 373 U.S. 690, 697 (1963). See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954) (NLRA designed "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"); *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (assuming breach of duty of fair representation is arguably subject to the NLRA); pp. 13-15, *infra*.

In view of the origins and development of the fair representation doctrine, the rationale of *Vaca* v. *Sipes* extends to all substantial fair representation claims. Because petitioner's fair representation claim was substantial, the district court had jurisdiction to adjudicate it on the merits.

1. The decision in *Vaca* v. *Sipes* rested on three basic considerations:

First, the Court found that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation." 386 U.S. at 180-181. The Court explained that courts had developed and elaborated the fair representation doctrine before the Board acquired statutory jurisdiction over union activities and before the Board first ruled that breaches of the duty of fair representation were unfair labor practices. *Id.* at 181. Moreover, when the Board decided that it would characterize breaches of that duty as unfair labor practices, it "adopted and applied the doctrine as it had been developed by the federal courts." *Ibid.* Indeed, fair representation cases often involve matters "not normally within the Board's unfair labor practice jurisdiction," giving rise to some doubt as to whether "the Board brings substantially greater expertise to bear on these problems than do the courts" (*ibid.*).

Second, the Court found that the duty of fair representation was a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (386 U.S. at 182). Noting that the Board's General Counsel has unreviewable discretion to refuse to institute unfair labor practice proceedings, the Court was unwilling to assume that Congress intended to deny employees their traditional judicial

remedy for a breach of the duty of fair representation. *Id.* at 183.

Finally, the Court cited "intensely practical considerations" in support of its conclusion that fair representation claims were not preempted (386 U.S. at 183). Claims that a union had breached its duty of fair representation would often arise in employees' suits to enforce collective bargaining agreements under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a), so that it would be anomalous and unwieldy to preclude courts from adjudicating fair representation issues in such actions. *Id.* at 183-187.

To be sure, petitioner's complaint does not allege that the union's actions have occurred in the context of a breach of contract, and therefore the last of these considerations may be inapplicable to the fair representation claim in this case. Nevertheless, in view of the undoubted applicability to this case of the other grounds for the holding in *Vaca* v. *Sipes*, the origins of the fair representation doctrine, and decisions after *Vaca* v. *Sipes*, it is clear that this feature of petitioner's fair representation claim does not justify a decision that it is preempted.

From its inception, the fair representation doctrine has not been limited to situations in which a union's failure adequately to represent the members of a bargaining unit results in a breach of a collective agreement. This Court first recognized the doctrine in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944), a case in which the union breached its duty to certain members of the bargaining unit by negotiating an agreement that discriminated against them. In that case, therefore, it was *enforcement* of the terms of an agreement, not a breach, that injured the employees. Consistent with the scope of the union's role as an exclusive representative of the members of a

bargaining unit, the duty of fair representation is now understood to extend to the negotiation, administration, and enforcement of collective agreements. *Communications Workers of America* v. *Beck*, 108 S. Ct. 2641, 2645 (1988).[4]

In decisions since *Vaca* v. *Sipes*, this Court has made clear that the exception to the *Garmon* rule for fair representation claims is as broad as the fair representation doctrine itself. In *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299 (1971), the Court observed, "[A]n action seeking damages for injury inflicted by a breach of a union's duty of fair representation [is] judicially cognizable in any event, that is, even if the conduct complained of [is] arguably protected or prohibited by the National Labor Relations Act and *whether or not the lawsuit [is] bottomed on a collective agreement*" (emphasis added). Similarly, in *Communications Workers of America* v. *Beck*, *supra*, this Court decided a fair representation claim on its merits

[4] The court of appeals erred, therefore, when it stated that an employee must "affirmatively allege that his *employer* breached the collective bargaining agreement" to state a claim for breach of a union's duty of fair representation. See Pet. App. A2. *Bagsby* v. *Lewis Brothers, Inc.*, 820 F.2d 799 (6th Cir. 1987), upon which the court relied, does not suggest otherwise. In that action, the plaintiff sought relief in court for a breach of a collective bargaining agreement without first exhausting contractual grievance procedures. When, as in that case, an employee seeks relief for a breach of a collective bargaining agreement and that agreement establishes a grievance procedure covering the relevant dispute, the employee concededly cannot prevail without demonstrating both that the union has breached the duty of fair representation in handling his grievance and that the employer has breached the collective bargaining agreement. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976); *Clayton* v. *Automobile Workers*, 451 U.S. 679, 681, 685-687 (1981). A showing of employer breach is not necessary, however, where the relief an employee is seeking is not dependent on a breach of contract.

even though no allegation of employer breach was or could have been made.[5] In keeping with these decisions, the courts of appeals, including the Sixth Circuit, have agreed that *Vaca* "establishes a broad immunity from preemption for all fair representation suits," not just cases that arise in connection with an alleged breach of a collective bargaining agreement.[6]

[5] Contrary to the court of appeals' suggestion (Pet. App. 2), *Local 100, Journeymen* v. *Borden, supra,* does not support a different view. *Borden* held only that the NLRA preempted the application of *state* law to a claim arising from discrimination in job referrals. Even though fair representation claims based on *federal* law can involve conduct that is arguably subject to the NLRA, those claims may nevertheless be judicially vindicated because "the *particular rule of law* sought to be invoked * * * is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Lockridge,* 403 U.S. at 297-298 (emphasis added). There is thus no inconsistency between *Borden's* holding that state law claims arising from conduct arguably subject to the NLRA are preempted and a decision that federal fair representation claims involving the same conduct are not. See *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 635-637 (1975).

[6] *Lewis* v. *Local Union No. 100 of the Laborers' Int'l Union,* 750 F.2d 1368, 1376 (7th Cir. 1984). Accord, *e.g., Storey* v. *Local 27, International Brotherhood of Teamsters,* 759 F.2d 517, 523 (6th Cir. 1985); *Beriault* v. *Local 40, Super Cargoes & Checkers,* 501 F.2d 258, 264-266 (9th Cir. 1974); *Smith* v. *Local No. 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d 741, 748-749 (5th Cir. 1974).

To our knowledge, no court in any case other than this one has held that a fair representation claim is preempted by the NLRA. The court of appeals erred in suggesting that *Journeymen Pipe Fitters Local 392* v. *NLRB,* 712 F.2d 225 (6th Cir. 1983), and *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.,* 779 F.2d 497 (9th Cir. 1985), aff'd, 484 U.S. 539 (1988), were such cases. See Pet. App. A2. Indeed, in the former case, the court observed that "[u]nder current law, an employee who has not been fairly represented may seek relief in more than one forum * * *." 712 F.2d at 228. *Laborers Health & Welfare Trust Fund* did not address the issue.

2. As the Court cautioned in *Beck*, 108 S. Ct. at 2647, "employees * * * may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." See also *Lockridge,* 403 U.S. at 301. That concern is met, however, when an employee's fair representation claim is colorable or substantial.[7] Petitioner's complaint satisfies that test. It states a fair representation claim of sufficient substance to confer jurisdiction on the district court and empower it to proceed to the merits.

When a collective bargaining agreement establishes a job referral system to provide employment to members of the bargaining unit, a union's operation of that system is part of the "administration" of the collective bargaining agreement and thus arguably falls within the scope of the union's duty of fair representation. *Beck,* 108 S. Ct. at 2645. The Board and several courts of appeals have held that a union breaches its duty to the members of a bargaining unit when it discriminates or acts arbitrarily or in bad faith in the operation of an *exclusive* hiring hall or referral system. *Smith* v. *Local 25,* 500 F.2d 748-749; *Beriault* v. *Local 40,* 501 F.2d at 264-266; *Lewis* v. *Local 100, Laborers,* 750 F.2d at 1376; *Operating Engineers, Local 406 (Ford, Bacon & Davis),* 262 N.L.R.B. 50, 51, 57 (1982), enforced, 701 F.2d 504, 508-509 (5th Cir. 1983); *Pipefitters Local 392 (Kaiser Engineers),* 252 N.L.R.B. 417, 421-422 (1980); *Cell-Crete Corp.,* 288 N.L.R.B. No.

[7] Cf. *Hagans* v. *Lavine,* 415 U.S. 528, 536-540 (1974) (federal courts have subject matter jurisdiction over constitutional claims that are "substantial"); *Bell* v. *Hood,* 327 U.S. 678 (1946) (distinguishing claims that are so insubstantial as to fail to create jurisdiction from those that are subject to dismissal on the merits for failure to state a claim).

32 (Mar. 29, 1988).[8] The Board has explained that "a labor organization must conform with and apply lawful contractual standards in the operation of the [hiring] hall and any departure from such standards which results in a denial of employment to an applicant for referral" constitutes the kind of "unfair, irrelevant, or invidious" treatment that violates the union's duty of fair representation—absent a showing that "the action was necessary for the effective performance of [the union's] function of representing its constituency." *Operating Engineers Local 406*, 262 N.L.R.B. at 57.

The district court found that this case involves a non-exclusive referral system, since employers were free to hire—and sheet metal workers to seek employment—outside the system. See Pet. App. A5. The Board has not yet ruled directly on whether discrimination in a non-exclusive referral system is a breach of the duty of fair representation.[9] However, at least a colorable argument can be made that, when a union that is the employees' exclusive representative undertakes to establish an optional referral system for the employees pursuant to the terms of a collec-

[8] A referral system is "exclusive" if the union has exclusive authority to provide workers to employers, even if that authority is limited to a specified period of time, such as 24 or 48 hours, or to a specified percentage of the work force. *Carpenters Local 608 (Various Employers)*, 279 N.L.R.B. 747, 754 (1986), enforced on other grounds, 811 F.2d 149 (2d Cir.), cert. denied, 108 S. Ct. 72 (1987). If employers are not required, for any period or as to any part of their work force, to hire through the referral system, the system is "non-exclusive."

[9] See *Carpenters Local 608*, 279 N.L.R.B. at 747 n.1 (finding an exclusive system, and thus declining to rely on an ALJ's conclusion that the duty of fair representation attaches to administration of a nonexclusive system). See also *Bricklayers' Local 8*, 235 N.L.R.B. 1001, 1007 (1978); *Carpenters Local 1016 (Bertram Constr.)*, 272 N.L.R.B. 539 (1984).

tive bargaining agreement, its duty of fair representation extends to the operation of that system. See *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (union's duty of fair representation is "equal in scope to its authority" as exclusive bargaining representative). Because the courts below dismissed on jurisdictional grounds, they gave no consideration to the merits of this theory. Accordingly, the judgment of the court of appeals should be reversed with respect to the fair representation claim and the case should be remanded for further proceedings on the merits.

B. *The LMRDA Claim*

The court of appeals also erred in holding that petitioner's LMRDA claim was preempted by the NLRA.[10] This Court has held that *Garmon*'s general rule of preemption does not apply to actions under the LMRDA. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971).

In *Hardeman*, a union member alleged that he had been expelled from the union in violation of Section 101(a)(5) of the Act, 29 U.S.C. 411(a)(5). The union argued that because the "gravamen" of the suit was a contention that the union had discriminated in job referrals, the action was subject to the NLRB's exclusive jurisdiction. 401 U.S. at 237; see also *id.* at 239. This Court disagreed with the union's characterization of the member's claim, finding that the "critical issue" raised by his claim was whether the union's disciplinary procedures complied with the LMRDA. *Id.* at 237-238. Moreover, the Court continued,

[10] Although the court of appeals' opinion is not entirely clear, we read it as dismissing petitioner's LMRDA claim on two alternative grounds: (1) preemption and (2) the absence of a showing of "discipline" within the meaning of the Act. See Pet. App. A2-A3.

Hardeman's LMRDA claim "implicate[d] none of the principles" recognized in the court's earlier preemption decisions. *Id.* at 240. Because Congress gave union members an express right to recover damages for violations of the LMRDA, Hardeman's claim was held to be "within the competence of the District Court." *Id.* at 241. The courts of appeals have also uniformly concluded that LMRDA claims are not preempted by the exclusive jurisdiction of the Board.[11]

The court of appeals cited *Hardeman* (Pet. App. A2), but did not attempt to reconcile that decision with its disposition of petitioner's LMRDA claim. Since there is no apparent basis for distinguishing this case from *Hardeman*, the court of appeals' determination that the LMRDA claim is preempted should be reversed.

II. PETITIONER'S COMPLAINT STATES A CLAIM UNDER THE LMRDA

Petitioner's amended complaint alleged (Pet. App. A21):

> Plaintiff's discriminatory treatment in job referrals • • • has been part of widespread, improper discipline for political opposition in violation of 29 U.S.C. [411(a)(5)] and 29 U.S.C. 529.

The court of appeals held that this allegation was insufficient as a matter of law, in the context of the job referral system in this case, because petitioner "did not demonstrate that he was improperly 'disciplined,' a crucial

[11] *Schmid* v. *United Brotherhood of Carpenters*, 773 F.2d 993, 995 (8th Cir. 1985); *Quinn* v. *DiGiulian*, 739 F.2d 637, 642-644 (D.C. Cir. 1984); *Vandeventer* v. *Local Union No. 513 of the International Union of Operating Engineers*, 579 F.2d 1373, 1377-1378 (8th Cir. 1978), cert. denied, 439 U.S. 984 (1978); *Keene* v. *International Union of Operating Engineers, Local 624*, 569 F.2d 1375, 1379 (5th Cir. 1978).

element to a LMRDA claim." Pet. App. A3. Relying principally on *Finnegan* v. *Leu*, *supra*, the court explained that the LMRDA "is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment." *Ibid.* In our view, this interpretation of the Act misconceives the decision in *Finnegan* v. *Leu* and improperly limits the protection that the LMRDA provides to the rank-and-file members of a union.

Section 101(a) of the LMRDA, 29 U.S.C. 411(a), establishes a "bill of rights" for union members. Subject to an exception not applicable here, subsection (2) of this provision confers on a union member the right to free speech, i.e., "to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting." The Act gives a union member two overlapping remedies for actions by a union that tend to restrain or punish the exercise of these rights. First, under Section 102, 29 U.S.C. 412, a person whose rights "have been infringed" by a violation of Section 101(a) may seek relief in a federal district court. Second, Section 609, 29 U.S.C. 529, makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under [Section 101, among others]." A violation of Section 609 is also actionable under Section 102.[12]

[12] See *Finnegan* v. *Leu*, 456 U.S. at 439-440 & n.10 (discussing the degree of overlap between Sections 102 and 609 and the sequence of events in Congress that resulted in the passage of these remedies).

In addition to protecting union members from retaliation for protected political activity, the LMRDA, in Section 101(a)(5), also guarantees a member procedural due process before he is "fined,

1. Petitioner's principal claim appears to be that he was "disciplined" by the Union—through discrimination in job referrals—for engaging in political activity that is protected by the LMRDA's bill of rights. At this juncture, this case presents only the question whether that claim was properly dismissed on the basis of a finding that the job referral system was open to non-members as well as to members of the union. The court of appeals erred, we believe, in its conclusion that *Finnegan* v. *Leu, supra,* requires that result. Moreover, the court's interpretation finds no support in the language, purpose, or legislative history of the Act.

In *Finnegan,* a newly elected president of a local union discharged the local's business agents and appointed replacements loyal to him. The agents who had been discharged brought an action under the LMRDA, alleging that they had been "otherwise disciplined," in violation of Section 609, for their political support of the former president. This Court affirmed the dismissal of the complaint, holding that "removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609." 456 U.S. at 439.[13] The Court ex-

suspended, expelled, or otherwise disciplined" by a union for any reason. 29 U.S.C. 411(a)(5). In the text, we focus upon Section 609 of the Act, which is worded in very similar terms. Our analysis of the actions that may constitute "discipline" for purposes of Section 609 is generally applicable to Section 101(a)(5) as well. See 456 U.S. at 438-439 n.9. However, we understand the principal focus of the complaint to be on alleged retaliation for political activity, rather than procedural due process.

[13] The Court also held that the discharges could not be challenged by alleging an "infringement" of the agents' rights within the meaning of Section 102 of the Act, since those rights were not intended to "restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." 456 U.S. at 441. We address below the applicability of Section 102 to this case. See pp. 24-26, *infra.*

plained that, for purposes of Section 609, the term "discipline" "refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union." *Id.* at 437.

The court of appeals understood this language to foreclose application of the LMRDA to the job referral program at issue in this case, because it found that the program was not limited to union members and thus, in a sense, was not a right that members of the union possessed as such. However, in *Finnegan*, this Court emphasized the Act's protection of rights enjoyed by union members in order to highlight the distinction between benefits enjoyed only by a subgroup of the union's members—members who also were policymaking employees of the union—and benefits extended to the union's rank-and-file. Indeed, the Court prefaced its analysis of Section 609 with the observation that "it is readily apparent, both from the language of these provisions and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect." 456 U.S. at 437. The Court found that the withdrawal of a benefit provided only to union employees and officers was different in kind from the types of disciplinary actions specified in the statute—fines, suspensions and expulsions—and thus could not be deemed to fall within the residual category of sanctions to which Section 609 applies. 456 U.S. at 437-438.

The question presented by this case is far different. Here, participation in the Union's job referral program is a benefit enjoyed by all members of the Union within the bargaining unit, and the issue is whether withdrawal of the benefit can be deemed "discipline" even though that benefit may also be extended to non-members of the

Union. *Finnegan*'s emphasis on the distinction between union members and union leaders does not apply to this situation. In fact, the court of appeals' reliance on language in *Finnegan* that drew that distinction turns the Court's approach on its head. *Finnegan*'s conclusion that the Act did not protect the positions and perquisites enjoyed only by union leaders was surely not intended to narrow the class of benefits, enjoyed by the rank-and-file, that cannot be withdrawn in retaliation for the exercise of protected rights.

The court of appeals implicitly acknowledged (see Pet. App. A3) that participation in a job referral system limited to union members would be a part of "a union member's rights or status *as a member of the union*" (456 U.S. at 437). The fact that non-members may be included within the system should not alter that characterization.[14] In either case, when a union member's removal from or demotion on an out-of-work list is based upon a violation of a union rule or policy, or political opposition to the union's leadership, the removal or demotion can fairly be characterized as a punitive action taken against the member *as a member* that sets him apart from other members of the rank-and-file. See *id.* at 437-438. Moreover, such an action bears enough similarity to the specific disciplinary actions referred to in Section 609 to fall within the residual category of sanctions—encompassed by the phrase "otherwise disciplined"—that are subject to that provision.

Any other interpretation of that phrase would be anomalous and inconsistent with the Act's purposes. We

[14] See *Moore* v. *International Brotherhood of Electrical Workers Local 569*, 653 F. Supp. 767, 770 (S.D. Cal. 1987) ("It simply does not follow that a given action [discrimination in hiring off an out-of-work list] does not affect a member's rights or status simply because non-members may belong to the list.").

can perceive no reason why Congress could have intended to prohibit a union from expelling a member of the rank-and-file from a members-only hiring hall for his political opposition to a union's leadership, but to permit the union to impose the same sanction for the same reason if the hiring hall includes some non-members. The language of the statute provides no support for such a distinction. Moreover, in *Finnegan*, 456 U.S. at 435-436, this Court noted that the LMRDA "placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." If Congress was concerned about union discipline that could lead indirectly to "loss of livelihood," it is unlikely that it would have exempted retaliation effected through union job referral systems from the Act, whether or not they include non-members, since that type of retaliation affects livelihood directly.[15]

The court of appeals decision most nearly on point is consistent with our interpretation of the phrase "otherwise

[15] See *Vandeventer* v. *Local Union No. 513, Int'l Union of Operationg Engineers*, 579 F.2d 1373, 1378-1379 (8th Cir. 1978).

Commentators have differed on the extent to which union actions reducing a member's employment opportunities constitute discipline for purposes of the Act. Compare Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L. Rev. 727, 732-735 (1969) (such actions constitute discipline when "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union"), and Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 Ga. L. Rev. 383, 392 (1975) ("The idea that 'discipline' includes only union action which affects membership status is unnecessarily narrow."), with Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference With Employment Opportunities*, 114 U. Pa. L. Rev. 700, 702 (1966) ("interference with employment opportunities should be excluded from the scope of section 101(a)(5)").

disciplined." In *Murphy* v. *International Union of Operating Engineers, Local 18,* 774 F.2d 114 (1985), cert. denied, 475 U.S. 1017 (1986), another panel of the Sixth Circuit held that a union's refusal to register a member's card in a union-operated job referral system, based upon the member's alleged theft of an election control list, was "discipline" for purposes of Section 101(a)(5) of the LMRDA. Rejecting the claim that this action was "employment-related" and thus exempt from the LMRDA under the reasoning of *Finnegan* v. *Leu*, the court explained (456 U.S. at 123-124):

> The Union's action in foreclosing Murphy's participation in the work referral program was a sanction which set him apart from other members in good standing. It unquestionably affected his membership rights. Judge Lambros correctly held that the removal of the card was discipline impermissibly imposed without a full and fair hearing.[16]

See also *Keene* v. *International Union of Operating Engineers, Local 624,* 569 F.2d at 1379-1380.

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[16] The court did not disturb a ruling by the district court that discrimination in the operation of a work referral system that fell short of completely foreclosing a union member's employment opportunities was not "discipline" for purposes of the Act. 774 F.2d at 122. However, it appears from the court's opinion that that ruling was not challenged on appeal and, because the court affirmed a determination that the discrimination was actionable under Section 102 of the Act in any event (774 F.2d at 122-123), the possibility that the existence of "discipline" might depend on the severity of the member's mistreatment does not appear to have been relevant to the disposition of the case.

Two other courts of appeals have held that a union's suspension of a member from a job referral system because the member had violated the terms of a collective bargaining agreement did not constitute "discipline" for purposes of Section 101(a)(5) of the Act. *Turner* v. *Local Lodge No. 455 International Brotherhood of Boilermakers*, 755 F.2d 866 (11th Cir. 1985) (observing illegal picket line); *Hackenburg* v. *International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982) (wildcat strike). Both courts held that, under the reasoning of *Finnegan* v. *Leu*, the enforcement of a collective bargaining agreement did not affect a union member's rights or status as a member of the union and did not implicate the purposes of the LMRDA. 755 F.2d at 869-870; 694 F.2d at 1239. We disagree with the reasoning of these cases to the extent they suggest that union actions depriving members of the rank-and-file of employment opportunities can never constitute "discipline." However, the critical circumstance on which both courts relied—the fact that union members were suspended from the job referral systems because they had violated collective bargaining agreements, rather than union rules or policies—is not present in this case. The question whether Congress intended union members to receive due process under the LMRDA in that situation therefore need not be addressed.

Concededly, not every action by a union adverse to a member can be characterized as "discipline." However, at a minimum, that term includes an action whose purpose or predictable effect is to punish or deter the exercise of rights protected by the Act.[17] In this case, the complaint alleged that actions taken by the Union against petitioner were "part of widespread, improper discipline for political opposition." Pet. App. A21. Liberally construed, that allegation states a potential claim under Section 609 of the

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[17] Similarly, in *Miller* v. *Holden*, 535 F.2d 912, 914-915 (1976), the Fifth Circuit applied the maxim of *ejusdem generis* to the phrase "fined, suspended, expelled, or otherwise disciplined" in Sections 101(a)(5) and 609 of the Act and concluded that an action affecting a member's employment could constitute "discipline" when (535 F.2d at 915):

> (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership, and (2) it directly penalizes him in a way which separates him from comparable members in good standing.

LMRDA. Because the court of appeals erred in its conclusion that discrimination in a job referral system open to non-members of a union can *never* constitute "discipline," its judgment must be vacated with respect to this issue and the case remanded for further proceedings.

2. When a union acts against one of its members in retaliation for his exercise of protected rights, Section 102 of the Act, 29 U.S.C. 412, may also provide a basis for relief. As noted above, Section 102 applies to actions that "infringe" rights protected by Title I of the Act, whether or not the action can also be characterized as "discipline." In *Sheet Metal Workers* v. *Lynn, supra,* this Court clarified the test by which courts may determine what actions infringe the right to free speech protected by Title I of the LMRDA. In that case, an elected union official had been removed from office because he opposed a dues increase proposed by a union trustee. The Court held that this action infringed the official's right to free speech. Finding that the official's dismissal forced him to pay a price for engaging in protected speech, the Court said that the determination whether that "interference" gave rise to a cause of action under Section 102 (109 S. Ct. at 644 (quoting *Finnegan* v. *Leu*, 456 U.S. at 441)):

> must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."[18]

[18] This "basic objective" was gleaned from the legislative history of the LMRDA, history that was reviewed in some detail in *United Steelworkers of America* v. *Sadlowski*, 457 U.S. 102, 109-111 (1982). See also *Finnegan* v. *Leu*, 456 U.S. at 435-436.

The Court also specifically rejected the argument that the union official's rights were not infringed because, although he had lost his job, he retained all of the rights available to union members generally. 109 S. Ct. at 644.

Under this analysis, it is clear that if discrimination against a union member in the operation of a job referral system is based on political activity protected by Section 101(a)(2), such discrimination would infringe the member's rights under that section and give rise to a cause of action under Section 102. A union member who is deprived of employment in retaliation for political activity has "paid a price for the exercise of his membership rights." *Sheet Metal Workers* v. *Lynn*, 109 S. Ct. at 644. That type of interference could not conceivably advance the Act's "basic objective" of fostering democratic government of unions.[19] Moreover, none of the considerations supporting this Court's determination in *Finnegan* v. *Leu*—that discharges from appointed policymaking posi-

[19] *Finnegan* v. *Leu* does not suggest otherwise. As the Court explained in *Lynn*, while an elected union president's discharge of officials appointed by his predecessor did have "some chilling effect" on their free speech rights, it also tended to "vindicate the democratic choice made by the union electorate." 109 S. Ct. at 644. Retribution against the rank-and-file in job referrals has no comparable justification. It is not conceivably "an integral part of ensuring a union administration's responsiveness to the mandate of the union's election." *Finnegan* v. *Leu*, 456 U.S. at 441.

Indeed, in *Finnegan*, 456 U.S. at 441 n.11, the Court reserved the question whether Section 102 would apply to discharges of "non-policymaking and nonconfidential employees." The Court could not have meant to suggest that interference with the outside employment opportunities of union rank-and-file was permitted while at the same time preserving the possibility that the jobs of some types of the union's own employees would be protected by the Act.

tions in a union are exempt from the LMRDA—applies to such a case. See 456 U.S. at 441-442.

Fairly construed, the amended complaint, which cited Section 102 and which alleged facts that could give rise to an action under that Section, could be understood to encompass a claim that the Union "infringed" petitioner's rights under Title I of the Act. We take no position on whether that claim has been properly preserved in the lower courts.[20] But we believe the court of appeals erred to the extent it suggested that proof of unlawful "discipline" is a "crucial element" of any LMRDA claim and that the "LMRDA's bill of rights is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment" (Pet. App. A3).

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[20] We note also that the last question presented in the petition (Pet. i), which focuses on the issue of "discipline," may not encompass the issue of whether the Union "infringed" petitioner's rights within the meaning of Section 102.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

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No. 88-124

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v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY, TEAMSTERS FOR A DEMOCRATIC UNION, AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE ASSOCIATION FOR UNION DEMOCRACY, TEAMSTERS FOR A DEMOCRATIC UNION, AND PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3, the Association for Union Democracy, Teamsters for a Democratic Union, and Public Citizen move the Court to grant them leave to file the accompanying brief as *amici curiae* in support of petitioner. Movants have secured the written consent of the petitioner, but respondent objects.

The Association for Union Democracy is a non-profit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective.

The sponsors of the Association include former leaders of major unions, religious leaders, members of union public review boards, lawyers, prominent educators in labor studies and labor law, and numerous union members. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which help sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal operations.

In the past, the Association has provided legal and other support to numerous workers who have been deprived of hiring hall referrals either arbitrarily, or in retaliation for their intra-union political activities. Indeed, the ability of union leaders to starve their opponents is one of the leading obstacles to democracy in construction unions, which are the principal users of hiring halls. The Association's experience leads it to conclude that members need the right to go to court in order to protect their rights to both work and dissent.

Teamsters for a Democratic Union ("TDU") is an organization of rank-and file members of the International Brotherhood of Teamsters who seek to reform their union and make it more effective and responsive to their needs as workers. Although most of TDU's members are full-time employees of a single employer, a significant number work out of hiring halls either in the trucking or construction industries. TDU members have first-hand experience both with union retaliation for the exercise of free speech rights within the union, and with the patent inadequacy of the National Labor Relations Board as a potential source of redress for such discrimination. TDU joins in filing this brief because if, as the lower courts held, members who have lost their jobs because of their intra-union political activity cannot go to court to protect themselves, the drive to reform and democratize the Teamsters union could be crippled.

Public Citizen is a public interest organization which was

founded in 1971 by Ralph Nader. Attorneys for Public Citizen frequently represent union members who have been unable to protect themselves from undemocratic practices without invoking judicial authority. Public Citizen has also found that the National Labor Relations Board is often unavailable as a practical matter for all of the workers who need its assistance, and so workers continue to need an independent judicial remedy for economic discrimination by their unions.

CONCLUSION

The Association for Union Democracy, Teamsters for a Democratic Union, and Public Citizen should be permitted to file the accompanying brief as *amici curiae* in support of petitioner.

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On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE ASSOCIATION FOR UNION DEMOCRACY, TEAMSTERS FOR A DEMOCRATIC UNION, AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* is set forth in the accompanying motion for leave to file brief as *amici curiae*.

STATUTORY PROVISION INVOLVED

In addition to the provisions cited in the Petition for a Writ of Certiorari, this case involves section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2), which provides:

FREEDOM OF SPEECH AND ASSEMBLY. — Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, and opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal and contractual obligations.

STATEMENT

Petitioner, a member of respondent Local 6 of the Sheet Metal Workers International Association, alleges that his union improperly deprived him of employment opportunities by abusing its power as his collective bargaining representative to refer employees through its hiring hall. According to petitioner, respondent both failed to refer him out properly according to his position on the local's "out of work" list, and deliberately refused to refer him to employers that had specifically requested him by name.

Petitioner asserts that this conduct violated his rights in two separate ways. First, he contends that respondent discriminated against him because he exercised his statutory right to support the political opposition within the local, rather than the incumbent leaders, and that this conduct violated the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.§§ 401 *et*

seq. ("LMRDA"). Second, he argues that, even if respondent did not intend to retaliate against him for supporting the insurgents, its hiring hall practices deprived him of employment in an arbitrary manner, in violation of its duty of fair representation ("DFR").

The lower courts, however, held that neither of petitioner's claims could be pursued directly in court. The district court ruled that petitioner's allegations of discriminatory practices in the respondent's hiring hall set forth an unfair labor practice claim, but went on to hold that the National Labor Relations Board ("NLRB") had exclusive jurisdiction of such claims. The district court did not consider whether respondent's conduct violated the authorities on which petitioner had relied in his complaint. The court of appeals agreed with the district court that hiring hall discrimination was an unfair labor practice, and held that petitioner's use of the label "duty of fair representation" did not avoid the preemptive effect of the NLRB's exclusive jurisdiction. It also held that petitioner had not stated a violation of the LMRDA because he did not show that he had been "disciplined," a term that the court held is restricted to punitive actions that diminish membership rights. The court reasoned that because hiring hall referrals are available to non-members as well as members, loss of employment opportunities could not be considered to be the loss of a right enjoyed by virtue of union membership, and hence was not actionable under the LMRDA.

SUMMARY OF ARGUMENT

The question of whether the LMRDA requires a union to accord a member due process protections before depriving him of employment opportunities turns on the nature of the denial and other facts that are not well defined on the preliminary record of this case. But with respect to petitioner's claim that he was deprived of employment opportunities in retaliation for his

having exercised his right to support insurgent candidates for union office, there is no question that that is one of the prime abuses that Congress intended to correct when passing the LMRDA. The lower court's refusal to recognize a cause of action based on its view that economic retaliation based on the exercise of free speech rights does not deny "membership rights" was wrong both because the right to dissent is a membership right, and because the focus on denial of "membership rights" is not required by the statute.

Petitioner is also entitled to pursue his cause of action for breach of the duty of fair representation. That duty extends to hiring hall referrals, whereby a union exercises its power as the employees' exclusive bargaining representative, and the Court has long held that the duty is enforceable in court, whether the action is brought solely against the union or against the union as well as the employer.

ARGUMENT

I. Petitioner's Allegations That the Union Denied Him Hiring Hall Referrals in Retaliation for His Exercise of Free Speech Rights State a Claim Under the LMRDA.

A. At the outset, we recognize that there is a problem with petitioner's LMRDA claim. Both the complaint and the petition for a writ of certiorari characterized the LMRDA claim as being based on denial of hiring hall referrals in retaliation for petitioner's participation in an opposition group within the union and for his campaign work for an insurgent candidate for local union office. These activities are plainly protected by section 101(a)(2) of the Union Members Bill of Rights in the LMRDA, and their infringement would be actionable under section 102 of the LMRDA.

However, although the complaint invokes section 102, it never mentions section 101(a)(2). Instead, the only section of the Union Members Bill of Rights that is invoked in the complaint is section 101(a)(5), which forbids unions from imposing discipline on their members without first according them the due process protections of written specific charges, reasonable time to prepare a defense, and a full and fair hearing. Yet the complaint makes no suggestion that petitioner has been deprived of any of these due process protections.

The question of what kind of due process rights a union member has when he is denied hiring hall referral is a difficult one that may turn on the nature of the denial, the length of time over which it operates, and whether the union purports to be enforcing rules under which the union or its hiring hall is supposed to operate. Just to take the two extremes, it is difficult to believe that Congress would have intended that, whenever a union is asked to send a worker to a particular job for that day only, it must issue a written notice to all interested members, allow them time to prepare, and then hold a hearing before deciding which member is to be referred. On the other hand, assume that a union believes that one of its members has broken a rule (hypothetically, a perfectly reasonable rule such as one that forbids assaults on the hiring hall dispatcher), but decides that the punishment should be, not expulsion from the union or a $1,000 fine, but indefinite denial of the use of the hiring hall, which may cost the member far more than $1,000 in lost income. It is hard to believe that Congress would have intended to allow a union to evade the due process protections established in the LMRDA to protect members whom the union desires to punish by the tactic of confining itself to economic punishment. Indeed, in a series of cases, the lower courts have held that such claims may be pursued under section 101(a)(5). *E.g., Detroy v. AGVA*, 286 F.2d 75, 81 (2d Cir. 1961); *Duncan v. Peninsula Shipbuilders Ass'n*, 394 F.2d 237, 239 (4th Cir. 1968). *See also Macaulay v.*

Typographical Local 13, 692 F.2d 201, 204 (1st Cir. 1982) (section applies when member alleges that he was arbitrarily singled out for punishment). *But see Hackenburg v. Boilermakers*, 694 F.2d 1237 (10th Cir. 1985).

In our view, however, the more important and more easily resolved LMRDA issue in this case is whether petitioner's claim of denial of referrals in retaliation for political activity is actionable under sections 101(a)(2) and 102 of the LMRDA. Although both the complaint and the petition specifically invoke section 609 of the LMRDA, which forbids unions from disciplining members in retaliation for the exercise of any of the rights provided by the LMRDA (including free speech rights), the petition is also clear that petitioner's LMRDA claim is predicated on retaliation for his political activities within the union. We agree with the view expressed by the Solicitor General, Brief in Support of Certiorari at 19 n.13, that petitioner's inartful phrasing of his Question Presented, and his citation of the wrong statutory provision in his complaint, should not bar the Court from considering whether the allegations in his complaint state a cause of action under the LMRDA.

It is entirely proper for the Court to decide this case under section 101(a)(2) because the ruling of the court below, precluding petitioner from pursuing his claim of retaliation under the LMRDA, was based on a wooden distinction between loss of "membership rights" and other injuries. Under that ruling, the LMRDA only protects members against union actions that deprive them of membership rights, a rationale that would apply equally to claims under sections 101(a)(2), 101(a)(5) and 609.

Before turning to an analysis of the statute and of this Court's cases construing it, we put forward a simple hypothetical that points up the inadequacy of the lower court's reasoning. Even respondent, we trust, would concede that a union member who is physically beaten at the behest of the union president, for having criticized the president at a union meeting, may claim the

protection of the LMRDA. Title I protects a member against such reprisals even though a punch in the nose does not alter the member's status as a member of the union. This is true even though union membership rights do not include a guarantee that a worker will not suffer a broken nose. The reason why there is a violation of Title I in these circumstances is that the member's nose was broken by agents of the union leadership *because* he exercised the membership right of expressing his views about the union's leadership.

The same reasoning applies to a member who is deprived of hiring hall referrals because he exercised his free speech rights, even though union membership rights do not include a guarantee of actual employment or of the availability of referrals. Indeed, the discussions of the purposes of the Bill of Rights on the floor of the Senate show beyond peradventure that Congress intended to forbid the very sort of employment-related reprisals that are alleged in this case. Thus, as Senator McClellan stated when he introduced the Union Members Bill of Rights as a floor amendment to the LMRDA, a "union man is not protected by effective law which he can use against beatings and tortures and job-loss as reprisals for assembling [and] for speaking up in meetings . . .." II NLRB, *Legislative History of the LMRDA* 1098 (1959). ("*Legis. Hist.*") Senator McClellan further explained that Congress needed to

> prescribe and define by law what the rights of union members are, place in them by the democratic process the power to secure those rights, and protect them in their efforts to do so *from reprisals of any kind* . . .. Without such protection, other provisions of law may be of little benefit and meaningless. Without such protection in the exercise of his legitimate rights, the records of our committee's investigations show over and over again that a rank-and-file member dare not

> risk any opposition to a corrupt or autocratic leadership. *If he does so*, he may be beaten, his family threatened, his property destroyed or damaged, *and he may be forced out of his job* — all of these things can happen and have happened.
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> II *Legis. Hist.* 1098 (emphasis added).

Having introduced his Bill of Rights amendment, Senator McClellan proceeded to explain what he intended to accomplish by each subsection of the amendment. Section 101(a)(2), he said, was addressed in part to the problem that his Select Committee had encountered of union members who were afraid of the consequences of speaking out:

> They are afraid of reprisals against them. Two waitresses from Chicago testified that it required six months to get a job. Union officials go around and interfere. They say to a prospective employer, "If you hire this person, you will have labor trouble." They cannot come here and tell the truth without risking reprisals.
>
> This provision is for the benefit of the working people, the people from whom some of these parasites draw the lifeblood which courses through their veins.
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> II *Legis. Hist.* 1103.

Nor did the opponents of Title I dispute that it would apply to employment-related reprisals. Remarking on the portion of the original Bill of Rights that would have given the Secretary of Labor the power to sue for violations of Title I, Senator Kennedy objected to section 101(a)(1), which gave members "equal rights and privileges within such organization," on the ground that it involved

> putting the Secretary of Labor into the adjustment of matters such as equal rights and privileges within a labor organization. I should think that would involve the Secretary of Labor in criminal offense procedures, *seniority disputes*, and every other matter as to which any member of a union may feel *he was discriminated against by union officers or by his employer* while he was a member of his union.
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> II *Legis. Hist.* 1113 (emphasis added).

Notwithstanding these objections, the Senate adopted the Bill of Rights, which, with modifications not relevant here, was enacted into law.[1]

Accordingly, most courts have held that employment-related reprisals for free speech activity are forbidden by and actionable under Title I. *Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 121-123 (6th Cir. 1985); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1378-1379 (8th Cir. 1978); *Duncan v. Peninsula Shipbuilders Ass'n*, 394 F.2d 237, 239 (4th Cir. 1968); *Taliaferro v. Schiro*, 669 F. Supp. 763, 776 (W.D. La. 1987); *Moore v. IBEW Local 569*, 653 F. Supp. 767, 769-772 (N.D. Cal. 1987). *See also Franza v. Teamsters Local 671*, No. 88-7258 (2d Cir., February 14, 1989), Opin. at 16. Even the AFL-CIO has recognized that

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[1] As enacted, the Bill of Rights is enforceable only by suits of individual members, not by the Secretary of Labor, as the McClellan amendment had provided. Senator Kennedy's remarks nevertheless support our argument that the Bill of Rights protects members against employment-related reprisals, because they show the Senate's understanding of the meaning of Section 101(a)(1), although the enforcement mechanism was changed.

> one of the principal reasons that Title [I] was enacted was to protect dissident members from economic reprisals by unions .... [A]n allegation that a union has sought to blacklist or procure the discharge of a dissident member clearly states a claim for relief under Title I.
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> *Reed v. UTU*, No. 87-1031 (S. Ct.), Brief of AFL-CIO as *Amicus Curiae*, at 18.

Thus, it is scarcely surprising that the court below is the *only* court of appeals to hold that employment-related reprisals for free speech activity are not actionable under the LMRDA.[2]

This Court's decision in *Sheet Metal Workers v. Lynn*, 109 S. Ct. 639 (1989), compels the conclusion that the reprisals alleged in this case are actionable under the LMRDA. In that case, as here, the union argued that a union member who had been deprived of his employment (there, as a union officer) because of his free speech activity had not been deprived of any rights enjoyed under Title I because he was still permitted to come to union meetings and remained a member of the union. This Court squarely rejected the argument because retaliatory reprisals force members to choose between their free speech rights and their jobs. *Id.* at 644-645. Moreover, the Court reasoned, the case was unlike *Finnegan v. Leu*, 456 U.S. 431 (1982), where the Court permitted a newly elected union president to remove his defeated predecessor's confidential and policy-making assis-

[2]In *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), the Court noted that the employee there was alleging intra-union discipline rather than discrimination in job referrals. Contrary to the view of the court below, Pet. App. A3, this Court did not hold that, if petitioner's claim had been based on union discrimination in job referrals, the LMRDA would not have applied or its application would have been preempted by the jurisdiction of the NLRB.

tants because the democratic benefits of ensuring the ability of the elected officers to vindicate the choice of the union electorate outweighed the cost in chilling the free speech rights of those who supported the loser. *Lynn*, 109 S. Ct. at 644.

This case is *a fortiori* from *Lynn*. As in *Lynn*, if a union official can deprive an insurgent member of employment opportunities through the union hiring hall, that would force the member to choose between his rights and his job. And, as in *Lynn*, there are no special reasons of the kind found in *Finnegan* that would warrant the Court in allowing such reprisals in order to assure that democratically elected union officials can carry out their mandates. Accordingly, petitioner has a valid claim that he was denied employment opportunities in retaliation for his exercise of free speech rights, in violation of sections 101(a)(2) and 102 of the LMRDA.[3]

In closing this section, however, we wish to express our concern about the reference to "membership rights" in *Finnegan* and *Lynn*. It is possible, as the Court did in *Lynn*, to define away the requirement that membership rights be implicated by concluding that Title I rights *are* membership rights, and thus membership rights are denied whenever Title I rights are denied. It seems far more straightforward, however, and less likely to lead the lower courts into thickets of verbal manipulation, for the Court simply to say that section 102 of the Act provides a cause of action whenever members are deprived of Title I rights, without erecting the extra requirement, for which there is no basis in the language of the statute, its legislative history, or its

[3]There is no basis for holding that the NLRB's authority preempts employees' right to enforce the LMRDA. To the contrary, as this Court said in *Reed v. UTU*, 109 S.Ct. 621, 629-630 (1989), "Title I of the LMRDA was a response to the perception that the NLRA, including the 8(b) provisions defining unfair labor practices by labor organizations, had failed to provide the necessary protection for the free speech and other rights of union members that Congress considered essential to the democratic operation of unions."

purposes, that a way be found to characterize the rights at issue as "membership" rights.

B. Petitioner's retaliation claim under the LMRDA would also constitute a DFR claim — *i.e.*, a union would plainly breach its DFR by exercising its power as an exclusive bargaining representative to the employee's detriment in retaliation for the employee's political activities. However, the LMRDA claim is generally a more potent tool for enforcing the retaliation claim, because punitive damages are generally held to be available in LMRDA cases, but not in DFR cases,[4] because attorney fees are a standard form of relief in LMRDA cases, although some courts do not allow them in DFR cases,[5] and because the lower courts are more likely to recognize the right to a jury trial in LMRDA cases than in DFR cases.[6] Indeed, it is for these reasons that *amici's* principal goal in this case is to preserve the ability of dissident employees, who lose employment opportunities in retaliation for their intra-union political activities, to pursue their claims under the LMRDA.

However, even if petitioner is unable to prove his retaliation

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[4]*Compare IBEW v. Foust*, 442 U.S. 42 (1979), *with id.* at 47 n.9; *Quinn v. DiGiulian*, 739 F.2d 637, 650-651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers*, 579 F.2d 1373, 1380 (8th Cir. 1978); *and Boilermakers v. Braswell*, 388 F.2d 193, 200 (5th Cir. 1968).

[5]*Compare Hall v. Cole*, 412 U.S. 1 (1973), *and Landry v. Sabine Indep. Seamen's Ass'n*, 623 F.2d 347, 350 (5th Cir. 1980), *with Harrison v. UTU*, 530 F.2d 558, 564 (4th Cir. 1975), *and Sanabria v. ILA Local 1575*, 597 F.2d 312 (1st Cir. 1979). *But see Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) (DFR plaintiff may recover from union damages attributable to "the difficulty and expense of collecting from the employer" that is caused by the union's refusal to pursue the grievance).

[6]*Compare Quinn v. DiGiulian*, 739 F.2d 637, 645-646 (D.C. Cir. 1984), *Feltington v. IATSE Local 306*, 605 F.2d 1251, 1257-1258 (2d Cir. 1979), *and Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 1018 (4th Cir. 1965), *with Terry v. Teamsters Local 391*, 863 F.2d 334 (4th Cir. 1988), *and Derringer v. Columbia Transportation*, 866 F.2d 859 (6th Cir. 1989). Ironically, the Sixth Circuit is the only circuit that denies a jury trial in LMRDA cases. *McCraw v. Plumbers*, 341 F.2d 705, 709 (1965).

claim, he may still proceed on his DFR claim. That is because the DFR extends to "arbitrary" and "perfunctory," as well as to retaliatory union conduct, *Vaca v. Sipes*, 386 U.S. 171, 191, 194-195 (1967), and petitioner's complaint alleges that the denial of referrals was "arbitrary" as well as discriminatory and in bad faith. Pet. App. A20. Moreover, the DFR serves a useful function even in the case of the dissident employee who suspects that he is the victim of retaliation, because the practical effect of the DFR is often to force the union to articulate a reason for its actions, which can then be evaluated in determining whether the real reason was a retaliatory motive. Finally, the DFR may be asserted by employees who, whether by their own election or by reason of exclusion from the union, have not obtained union membership. Accordingly, we urge the Court to consider the viability of petitioner's DFR claim regardless of whether it upholds his LMRDA claim, and in the remaining pages of this brief we address that issue briefly.

II. Petitioner's Allegations of Arbitrary and Discriminatory Denial of Hiring Hall Referrals Under the Collective Bargaining Agreement State a Claim for Breach of the Duty of Fair Representation That May Be Pursued in Court.

Over the past forty-five years, in cases beginning with *Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944), and *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), and continuing to last Term, *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988), the Court has repeatedly held that the DFR is implicit in the provisions of the federal private sector labor laws. *See also Karahalios v. National Fed'n of Fed'l Employees*, 109 S. Ct. 1282 (1989) (public sector unions' DFR is explicitly assigned to federal agency for enforcement). These laws encourage employers to recognize unions as the collective representatives of

employees, and extinguish the right of employees to strike individual bargains governing the terms and conditions of employment where those bargains are inconsistent with the terms on which the employer and the collective bargaining representative have agreed. The Court has reasoned both that the right to bargain as an exclusive representative imposes a duty that is fiduciary in nature to represent those employees fairly and impartially, and that the statutory extinguishment of the right to contract on an individual basis would raise serious constitutional questions were there not a concomitant statutory duty to use that power fairly. *E.g., Wallace Corp., supra*, 323 U.S. at 255-256; *Steele, supra*, 323 U.S. at 198-199.

There should be no question that the DFR extends to the arbitrary denial of hiring hall referrals, as well as to other misuse by a union of its authority as an exclusive bargaining representative. Although all of the cases that this Court has thus far considered involved the union's exercise of its exclusive power over the processing of grievances (including the conduct of arbitration hearings), *e.g., Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Bowen v. Postal Service*, 459 U.S. 212 (1983), or the negotiation of the terms of employment in collective bargaining agreements, *e.g., Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988), there is no reason why the arbitrary exercise of exclusive union authority over a hiring hall should be treated any differently.

Indeed, the reasons for applying the DFR are at least as strong in hiring hall cases such as this as in grievance or negotiation cases. After all, in the grievance situation the complaint is that the employee believes that he has been wronged by the employer and that the union has failed to help him obtain redress; in the negotiation situation the employee presumably wants something from the employer, and the union has failed to try to get it for him.

But here employers actually requested petitioner by name, as the collective bargaining agreement permits, and petitioner alleges that the union has positively interfered with the consummation of the bargain that the employee has obtained. The reasons for inferring the DFR cause of action recognized in *Steele* and *Wallace* thus apply with as much force to cases such as this one as they would if the union were either conniving with or acquiescing in an employer's decision to prevent certain employees from being employed.[7]

The Court has also held that the DFR may be enforced by filing suit in court, even though the right at issue is derived from the National Labor Relations Act ("NLRA") and even though the NLRB normally has exclusive jurisdiction to enforce the NLRA. This right to go to court was recognized in the early DFR cases, such as *Steele* and *Syres*. Subsequently, the Court held in *Vaca* that the NLRB's recognition of the DFR as an unfair labor practice that violates section 8(b)(1)(A) of the NLRA, and that is litigable before the Board in a proceeding under section 10 of the NLRA, did not supersede the Court's earlier recognition of the individual employee's cause of action to enforce the DFR by suing in court. The Court has followed this holding ever since, including in last Term's decision in *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988).[8]

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[7]The district court characterized the hiring hall in this case as non-exclusive, relying on the fact that members may solicit their own employment. Pet. App. A5-A6. Whether or not this is an accurate use of the term "non-exclusive," the collective bargaining agreement requires the employer to look to the union for referrals, even of those employees requested by name, unless enough workers are not provided within 48 hours, Jt. App. 29, 55, 57, and this exclusive authority as the worker's collective representative must, under the DFR, be exercised fairly.

[8]As with the DFR generally, the Board's treatment of hiring halls vacillated considerably before it took its current form, *see* II BNA, *The Developing Labor Law* 1396 n.220 (2d ed. 1983), and the belated erection of NLRB protections for employees arbitrarily denied employment should not supersede the application of the DFR to these cases.

Neither the lower court nor respondent, in its opposition to the petition for a writ of certiorari, gave any reason why *Vaca* and *Beck* ought not to apply to fair representation cases such as this one. Nonetheless, one might argue that this hiring hall case differs from the typical "hybrid" DFR claim, in which the employee is aggrieved by the union's abuse of its power over the grievance procedure, and he sues both the union for breach of the DFR and the employer for breach of a collective bargaining agreement. *E.g., Hines v. Anchor Motor Freight, supra; Bowen v. Postal Service, supra.* Under this theory, it could be argued that because one of several reasons given in *Vaca* for allowing DFR claims to be pursued in Court — that it made no sense to relegate the claim against the union to the NLRB, while the contractual claim against the employer had to be pursued in court under section 301 of the Labor-Management Relations Act — was not present, there is no need for a court remedy. *See Karahalios, supra*, 109 S. Ct. 1282.

But DFR cases in the grievance-administration category may be brought solely against the union, as this Court recognized in *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970); indeed, *Vaca* was filed solely against the union. Moreover, DFR cases in the contract negotiation category will normally be brought solely against the union, because the problem is not a violation of the contract, but the terms that the union has agreed to put in it. Yet such cases may be pursued in federal court just as the more common hybrid cases are. But, more fundamentally, even hiring hall cases may be brought against employers as well as unions, where, for example, the employer and the union conspire to violate both the referral procedures and the collective bargaining agreement, to the detriment of a dissident union member. Thus, although this case has been filed against the union alone, there is no reason to make an exception to the general rule, which allows DFR cases to be pursued in court, so that hiring hall DFR cases could be pressed only by the General Counsel of the NLRB,

whose decisions not to prosecute are virtually unreviewable.

Instead of articulating a reason for carving out an exception to *Vaca*, both respondent and the lower courts invoked the decision in *Plumbers Local 100 v. Borden*, 373 U.S. 690 (1963), which they cite for the propositions that any claim of discriminatory hiring hall procedures is arguably an unfair labor practice and that the NLRB's jurisdiction over unfair labor practices ousts both federal and state courts of jurisdiction. But the only question squarely presented in *Borden* was whether a state court could apply state law to such cases, and that is the proposition for which it is normally cited. *E.g., Boilermakers v. Hardeman*, 401 U.S. 233, 240 (1971). Although *Borden* does contain some broad language about both state and federal jurisdiction, the Court never considered whether the federal DFR could be enforced in such cases. To the extent that there may be some inconsistency between dicta in *Borden* about the impact of NLRB jurisdiction on federal as well as state jurisdiction, and the long line of this Court's cases running from *Syres* through *Beck* which recognize federal court jurisdiction to enforce the DFR, it would do far more violence to the fabric of contemporary federal labor law to curtail the *Syres* and *Beck* line of authority than to limit *Borden* to the state preemption issue that was presented there.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 7, 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

APR 7 1989

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONER

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April 7, 1989

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No. 88-124

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On A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of the petitioner.

INTEREST OF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a nonprofit charitable organization that exists to

provide free legal assistance to individual employees whose rights are being denied or who are suffering discrimination in employment as a result of compulsory unionism arrangements. It is the purpose of the Foundation to aid such individuals in protecting the rights guaranteed to them under federal and state law; they seldom are able, without assistance, to defend their rights against labor organizations, which have abundant legal talent and resources at their disposal.

The Foundation has a vital interest in the crucial questions addressed by the present case. These questions involve employee right of access to federal district courts to remedy union violations of the duty of fair representation, and a union's ability to "discipline" union dissidents through a discriminatory job referral program.

For the foregoing reasons, the National Right to Work Legal Defense Foundation requests that this motion be granted and that the annexed brief be accepted for filing.[1]

Respectfully submitted,

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[1] In accordance with the Court's rules, the undersigned sought consent of the parties to the filing of this brief *amicus curiae*. Although petitioner consented to the filing, respondent union chose to withhold consent. *Amicus curiae* regrets to have to use this Court's valuable time to request leave to file this brief *amicus curiae*, but is left with no alternative in light of respondent's unwillingness to consent.

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v.

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 6,

Respondent.

On A Writ Of Certiorari
To The United States Court
Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONER

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April 7, 1989

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No. 88-124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 6,

Respondent.

On A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONER

Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation files this brief *amicus curiae* in support of petitioner.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF ARGUMENT

For the last forty years, the federal district courts have traditionally provided a judicial forum for employees injured by their unions' actions in violation of the duty of fair representation. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). In order to assure that the employee is not deprived of effective remedies when the exclusive representative fails in its duties, this Court has long recognized federal court jurisdiction over claims alleging a breach of the union's duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967). In addition, federal court jurisdiction over fair representation claims is not limited to cases in which the plaintiff alleges that his employer breached the collective bargaining agreement. *Communications Workers of America v. Beck*, ____ U. S. ____, 108 S. Ct. 2641 (1988); *Amalgamated Association of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971).

In *Vaca*, the Court recognized that administrative agencies charged with administering labor relations statutes have preeminent institutional goals which may, at times, result in subordinating the individual employee's remedies to remedies that either uphold the rights of employees making up a collective bargaining unit or protect a union's statutory prerogative to perform as exclusive representative. Accordingly, if the wronged employee were deprived of a judicial forum, the basic principles underlying the duty of fair representation would be entirely frustrated, and the constitutionality of the congressional grant of exclusive representation would be called into question. *Vaca*, 386 U.S. at 183.

In *Tunstall v. Bhd. of Locomotive Firemen*, 323 U.S. 210, 213 (1944), this Court specifically held that federal

court jurisdiction over employees' duty of fair representation claims was predicated upon 28 U.S.C. § 41(8), the statutory predecessor of 28 U.S.C. § 1337. No reason exists to depart from this well-established premise of duty of fair representation law. To depart from the holdings of *Vaca*, *Tunstall* and the host of other cases finding federal court jurisdiction for duty of fair representation claims would not only call into constitutional question the doctrine of "exclusivity"; it would also frustrate a preeminent concern of federal labor law, which is to protect the rights of the individual employee in the workplace.

With regard to petitioner's claim under the Labor-Management Reporting and Disclosure Act (LMRDA), the actions of respondent union should be actionable under the LMRDA. The LMRDA was the product of congressional concern over the widespread abuses of power by union leadership, *Finnegan v. Leu*, 456 U.S. 431 (1982). Such abuse is exactly what is present herein.

The overriding objective of the LMRDA is to "ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. Allowing individuals like petitioner to be subjected to actions such as those he has been made to endure would render meaningless petitioner's rights under the LMRDA, and also the rights of other union members who may conclude that challenging the union's hierarchy is done at one's peril and loss of livelihood. *Id.* at 435-36. In passing the LMRDA, Congress recognized "that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Steelworkers v. Sadlowski*, 457 U.S. 102, 112 (1982); *see also Sheet Metal Workers' International Ass'n v. Lynn*, ____ U.S. ____, 109 S. Ct. 639 (1989).

The use of hiring hall discrimination by union leadership in retaliation for an employee's failure to support the union hierarchy in a union election is precisely the kind of unlawful conduct that the LMRDA was enacted to address.

ARGUMENT

I. Forty years of precedent clearly shows that a union member's claim that his collective bargaining representative breached its duty of fair representation by engaging in discriminatory job referrals is properly brought in federal district court invoking the court's jurisdiction under 28 U.S.C. § 1337.

This Court has long recognized that the broad authority of the union as an exclusive bargaining agent must be accompanied by "a responsibility equal in scope to its authority, 'the responsibility of fair representation.'" *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), *citing Humphrey v. Moore*, 375 U.S. 335, 342 (1964). The duty of fair representation stands as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *DelCostello v. Teamsters*, 462 U.S. 151, 164 n.14 (1983), *citing Vaca*, 386 U.S. at 182.

In order to assure that the employee is not deprived of effective remedies when the exclusive representation system breaks down, this Court has repeatedly recognized that federal district court jurisdiction over duty of fair representation cases is essential. *DelCostello*, 462 U.S. at 164; *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 47-49 & n.12 (1979); *Glover v. St. Louis-San*

Francisco Ry. Co., 393 U.S. 324, 328-29 (1969); *Vaca*, 386 U.S. at 182-83; *Czosek v. O'Mara*, 397 U.S. 25 (1970).

One of the cornerstones of the private sector labor law structure is the union's duty of fair representation. The Court has recognized that, "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182. "In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975); *see also DelCostello*, 462 U.S. at 164 n.14; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). Consequently, the Court has fashioned the duty of fair representation to counterbalance Congress' grant of exclusive representation power to unions. *Vaca*, 386 U.S. at 177; *Humphrey*, 375 U.S. at 342; *Steele*, 323 U.S. at 202-03.

Essential to the duty of fair representation is the injured employee's unconditional ability to seek redress in the courts. *Vaca*, 386 U.S. at 182. This Court in *Vaca* underscored the significance of the special concerns of the individual employee in a duty of fair representation case, and held that these interests compelled *judicial*, as opposed to merely administrative, review:

> *[T]he unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases.* . . . The collective bar-

> gaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. Since that landmark decision, *the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.*

Id. at 181-82 (citations omitted) (emphasis added).

The Court further acknowledged that the NLRB, as an administrative agency, is not particularly well structured to remedy *individual* duty of fair representation injuries. Unlike a trial court, redress of individual grievances is not the primary purpose of administrative agencies such as the NLRB. *Id.* at 182 n.8. *Vaca* recognized that the NLRB's administrative focus in considering an unfair labor practice case where the duty of fair representation is involved does not specifically concern the wrong done to the employee.

> The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial."

Id. (citations omitted).

Considering the necessarily limited institutional role of the NLRB, together with the NLRB General Counsel's unreviewable discretion to issue unfair labor practice complaints, this Court in *Vaca* acknowledged that the available administrative remedies were often inadequate in duty of fair representation cases. The Court was concerned that the limited administrative focus of the NLRB might lead to a group of employees never having their complaints adequately redressed. This concern led directly to the enunciation in *Vaca* of the right to have these issues determined by a court, not the NLRB. Only in a court, where the focus is on the wrongs done to the individual employee before it, would the harm done to the employee be adequately and completely remedied. As Justice White emphasized in *Vaca*:

> The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Id. at 182-83.

Even though the union's actions in question might also constitute an unfair labor practice which could be heard by the NLRB, the Court's recognition of the potential inadequacy of the administrative remedy for individual employees led to the holding that the courts must provide a forum for individual redress. *Id.* at 188. As the Court has held, where duty of fair representation cases are involved, the right of the individual employee to be made whole is "[o]f paramount importance," *Bowen*, 459 U.S. at 222; *cf. Foust*, 442 U.S. at 49; *Steele*, 323 U.S. at

206-07. This is a concept which necessitates a judicial, not an administrative, forum.

This Court should not depart from the sound justification for providing a federal forum for an employee who has had his rights violated by a union statutorily charged with fairly and nondiscriminatorily representing his bargaining unit. When a union abuses the privilege of administering a job referral program, the exclusive representation process (which is the consequence of a union's Section 9 status) breaks down. Permitting an individual employee to seek *judicial* redress of the union's abuse of its congressionally created status was specifically what this Court intended to accomplish in *Vaca* and *Beck*. In the context of the instant case, this would mean that the petitioner must be found to have the right to pursue his federal court action to determine whether the union, exercising its *exclusive* right to represent all bargaining unit members, represented him fairly in its dealings with the employer.

This is *precisely* the scenario about which this Court was so concerned in *Vaca*. Surely a comprehensive system of federal labor relations cannot ask the federal employee to surrender his individual rights to a union, but then strip him of the ability to obtain an effective remedy when the union abdicates its responsibilities. The court is the only forum where the individual employee can be assured that the harm done to him by the union will be unconditionally and adequately redressed.

II. This Court has recognized the traditional basis for jurisdiction over "hybrid" duty of fair representation claims under 28 U.S.C. § 1337 because those claims "arise under" the congressional grant of authority for unions to act as exclusive representatives under § 9(a) of the NLRA.

This Court has recognized: (1) that jurisdiction over duty of fair representation claims is implied from the grant of exclusive representation status, *Vaca*, *supra*; (2) that jurisdiction exists over such claims "arising under" the NLRA; and (3) that jurisdiction exists over such claims, regardless of whether they are coupled with a § 301 "hybrid" claim against an employer. *Beck*, *supra*. Under these familiar principles, district court jurisdiction over duty of fair representation claims in the private sector is clearly appropriate, because these claims "arise under" the congressional grant of exclusive representation. *See* 28 U.S.C. § 1331.

The duty of fair representation did not find its genesis in any explicit statute. In private sector labor relations, the duty has been judicially fashioned by this Court from the National Labor Relations Act. *DelCostello*, 462 U.S. at 164.

In *Tunstall*, 323 U.S. at 213, a companion case to *Steele*, *supra*, this Court specifically held that federal court jurisdiction over employees' duty of fair representation claims was predicated upon 28 U.S.C. § 41(8), the statutory predecessor of 28 U.S.C. § 1337.[1]

Since *Steele* and *Tunstall*, this Court has repeatedly recognized that under the NLRA, many private sector

[1] 28 U.S.C. § 1337 is the commerce counterpart of 28 U.S.C. § 1331, the "general federal question jurisdiction" statute. It is generally recognized that § 1337 is merely the more specific of these two jurisdictional grants. *See* 13B Wright & Miller, *Federal Practice & Procedure*, § 3574 (1984); *Gorski v. Local Union 134, IBEW*, 636 F. Supp. 1174, 1183 n.14 (N.D. Ill. 1986); *Beriault v. Local 40, Super Cargoes & Checkers of I.L. & W. U.*, 501 F.2d 258, 264-65 (9th Cir. 1974).

duty of fair representation suits comprise two distinct causes of action: one against the employer for breach of contract under § 301, and the other against the union for breach of the duty of fair representation, with jurisdiction impliedly emanating from the congressional grant of exclusive representation contained in § 9(a) of the NLRA. *DelCostello*, 462 U.S. at 164 n.14. *See also Bowen v. United States Postal Service*, 459 U.S. 212 (1983). (These combined claims have been referred to as "hybrid § 301/fair representation" claims.) *DelCostello*, teaches that the true jurisdictional bases for the union's portion of the "hybrid" duty of fair representation claim are 28 U.S.C. §§ 1331 and 1337, because those claims "arise under" the congressional grant of exclusive representation, § 9(a) of the NLRA. *See* Boyce & Turner, *Fair Representation, the NLRB and the Courts* 123-27 (No. 18, Labor Relations and Public Policy Series, University of Pennsylvania Wharton School, Industrial Research Unit, 1984).

In addition to "hybrid" § 301/fair representation claims, employees in the private sector have successfully brought duty of fair representation actions against their unions for a wide array of arbitrary, discriminatory and hostile conduct which was *not* specifically related to any employer breach of contract. *E.g.*, *Beck*, 108 S. Ct. 2641 (union uses nonmembers' agency fees for political activities); *Anderson v. United Paperworkers*, 641 F.2d 574 (8th Cir. 1981) (union misrepresentation regarding contract ratification issue); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Many lower courts have held that the proper jurisdictional bases for these types of "bare" duty of fair representation claims are 28 U.S.C. §§ 1331

and 1337. *See Retana v. Apartment, Motel, Hotel & Elevator Operators, Local 14*, 453 F.2d 1018 (9th Cir. 1972); *Smith v. Local 25, Sheet Metal Workers*, 500 F.2d 741 (5th Cir. 1974); *Chavez v. United Food & Commercial Workers International Union*, 779 F.2d 1353 (8th Cir. 1985); *Anderson*, 641 F.2d at 576; *Gorski*, 636 F. Supp. at 1182-83; *see also* Boyce & Turner, *Fair Representation, the NLRB, and the Courts* 123-27.

With this wide precedential base supporting the conclusion that federal courts have jurisdiction over "non-hybrid" duty of fair representation claims under 28 U.S.C. § 1337, it is respectfully submitted that the court of appeals erred when it concluded that there was no "federal question" jurisdiction for the district court to hear petitioner's complaint regarding the union's discriminatory operation of a hiring hall.

III. The failure of a union to refer one of its members for employment because of his participation as an adversary in a union election is "discipline" that can be redressed through the Labor-Management Reporting and Disclosure Act.

In section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401 *et seq.*, fines, suspensions and expulsions are specifically enumerated as the types of discipline that require compliance with statutory safeguards. The section also requires compliance when a union member is "otherwise disciplined" which has generally required there to be some finding that union action has actually resulted in a detriment to the union member. As one court has put it, the purpose of the section is "to provide procedural safeguards to union members when an action taken against

them would result in the loss of some valuable membership right, monetary or otherwise," *Pittman v. United Bhd. of Carpenters*, 251 F. Supp. 323, 324 (M.D. Fla. 1966).

It is clear that it was Congress' intent in the LMRDA to allow the invocation of Section 101(a)(5) whenever a union seeks to limit a member's employment opportunities. As this Court has stated, such an inquiry would not determine the validity of a union's substantive rule but instead would allow a determination as to whether Section 101(a)(5)'s requirements have been complied with. *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 245 (1971).

Respondent may well argue that the type of discipline directed at petitioner herein in no way affects his membership rights because hiring hall referrals are available to nonunion members. Such an argument is disingenuous and belies the realities of the workplace.

Union members have certain rights and prerogatives in the hiring hall that separate them from nonmembers. One of those rights includes the ability to elect officers of the union. To conclude that Congress protected the rights of members to participate in the electoral process by expressing their views, yet not protect their right to express their views without being in jeopardy of losing their ability to earn a living would put the statute at odds with its own purposes. Accordingly, any union action which penalizes petitioner in a way which separates him from comparable members in good standing would constitute discipline within the meaning of the LMRDA. *See Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976). When union discrimination in the operation

of a hiring hall is coupled with petitioner's action opposing the union hierarchy in a recent election, the test for application of the LMRDA "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections" is met. *Finnegan v. Leu*, 456 U.S. at 441.

The overriding objective of the LMRDA is to "ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* Allowing individuals like petitioner to be subjected to actions such as those he has been made to endure would render meaningless petitioner's rights under the LMRDA and also the rights of other union members who may conclude that challenging the union's hierarchy is done at one's peril and loss of livelihood. *Finnegan v. Leu*, 456 U.S. at 435-36. In passing the LMRDA, Congress recognized "that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Steelworkers v. Sadlowski*, 457 U.S. at 112; *see also Sheet Metal Workers v. Lynn, supra.*

The actions of respondent union should be held to be actionable under the LMRDA. The LMRDA was the product of congressional concern over the widespread abuses of power by union leadership. *See generally Finnegan v. Leu, supra.*

CONCLUSION

For the above stated reasons, as well as those contained in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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